[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(November 7, 1953)

COSTAS SKOULIAS OF NICOSIA, *Appellant*,

v.

TAKIS PHILIPPIDES OF NICOSIA, INFANT, BY CHARALAMBOS PHILIPPIDES OF NICOSIA, HIS FATHER, *Respondent*.

(*Civil Appeal No.* 4026.)

Liability of minor in tort—Civil Wrongs Law, s. 8—Tort arising out of contract.

The defendant, a minor, hired a motor-car from the plaintiff which was seriously damaged through the negligent driving of the defendant. The Civil Wrongs Law (Cap. 9) section 8 provides that an action for a civil wrong does not lie when the wrong "arises directly or indirectly out of any contract entered into by" a minor. The trial Court held that section 8 was a good defence and dismissed the claim. The plaintiff appealed.

Held on appeal: (1) Section 8 reproduces the common law and must be interpreted in the light of the English decided cases.

(2) The minor, though negligent, had not stepped outside the contract of bailment. The obligation to take care in driving the motor-car arose out of the contract of bailment, and the breach of this obligation was an essential ingredient in the tort. The tort was therefore not independent of the contract.

Burnard v. *Haggis*, 143 E.R., 360, and *Walley* v. *Holt*, 35 L.T. 361, distinguished.

Appeal dismissed.

Appeal by plaintiff from the judgment of the District Court of Nicosia (Action No. 1493/51).

Char. Ioannides for the appellant.

A. Indianos for the respondent.

Judgments were delivered by:

HALLINAN, C.J.: The appellant in this case seeks to recover damages against a minor, an unmarried youth 16 years old, to whom the appellant hired a motor car which was seriously damaged through the negligent driving of the minor.

Under section 11 of the Contract Law (Cap. 192) an unmarried person under the age of 18 is not competent to contract and the contract of hire in the present case cannot be enforced. The appellant accordingly sued the minor for the tort of negligence. A person over 12 years old can be sued for tort subject to the proviso contained in section 8 of the Civil Wrongs Law, (Cap. 9) which states that:

"No action shall be brought against any such person (that is to say a person under the age of eighteen) in respect of any civil wrong when such wrong arises directly or indirectly out of any contract entered into by such person."

The question to be decided on this appeal is whether the trial Court was right in finding that the civil wrong of negligence in this case flows directly or indirectly out of the contract of hire.

In interpreting the proviso to section 8 I may say at once that the intention of the legislative authority here is merely to reproduce the common law and the phrase " when such wrong arises directly or indirectly out of any contract " must be limited and applied in the light of the decided cases on this subject in England.

The general object of the Law limiting the liability of a minor in tort is clear—it is to preserve the principle that a minor is not in general competent to contract ; but it is not easy to define in general terms the occasions on which the Law will limit infants' liability in tort in order to uphold the law of contract. Perhaps the following passage from 17 Halsbury's Laws of England, Second Edition, page 620, is the best summary of how this proviso limiting the liability of a minor in tort is applied by the English Courts :

> " An infant is not liable for a tort which is founded on a contract on which he cannot be sued, as in the case of the warranty of a horse, or for a fraudulent misrepresentation as to his age, which induces a party to contract with him ; but he is liable for any tort which, though connected with the subject matter of a contract, is a separate and independent act of a kind forbidden, or not contemplated by the contract, or if the action in substance arises *ex delicto*."

In the course of the argument on this appeal four cases have been cited where hirings have been made to minors. The first of these cases is *Jennings* v. *Rundall*, 1799, 101 E.R., 1419. In that case the plaintiff hired a mare to an infant. The pleadings alleged that the plaintiff had so delivered the mare to be moderately ridden by the defendant ; and yet that the defendant wrongly and injuriously rode the mare so that the animal was greatly strained and damaged. It was held that the action, being in substance founded on contract, failed.

In the next case *Burnard* v. *Haggis*, 1863, 143 E.R., 360, the plaintiff again hired a mare to a minor and expressly told him that the mare was not to be jumped. The charge for hiring a horse to jump was greater than merely for a hack. The mare was put to a fence and while jumping was injured so that she died. There the minor was held liable in tort.

The report in the third case *Walley* v. *Holt*, 1876, 35 L.T., 631, unfortunately is not available and we can only rely on the summary of this case contained in 28 English & Empire Digest, case 389, at page 179. The plaintiff hired

to a minor a mare and a dogcart ; the minor drove the mare at such an excessive speed and so badly cut, bruised and injured the mare by beating and ill-treatment that the animal had to be destroyed. It was held that the infant was liable in tort, apart from the contract of hire.

In the last case, *Ballet* v. *Mingay*, 1943, K.B. 281, the plaintiff hired an amplifier and microphone to an infant who was unable to deliver it back to the plaintiff because he had parted with the possession. It was held that the infant was liable for the tort of detinue independently of the contract of hire.

The opinion is expressed in Salmond on Tort, 10th Edition, page 61, that *Jennings*' case was wrongly decided and is in conflict with *Burnard's* case. Despite this opinion, I think *Jennings*' case is still good law and can be distinguished from *Burnard's* case, just as Lord Greene, M. R., distinguished it from *Ballett's* case. In *Burnard's* case the damage to the animal was the result of an act expressly forbidden by the contract. To use the words of Willes, J., in that case " it was a bare trespass, not within the object and purpose of the hiring .... It was doing an act towards the mare which was altogether forbidden by the owner." In *Walley's* case also the manner in which the animal was used by the minor, being cut and bruised to such an extent that it had to be destroyed, was so beyond " the object and purpose of the hiring " that the wrong might be considered to be independent of the contract. In *Jennings*' case, however, the Court obviously regarded the damage to the animal as in the nature of an accident. Lord Kenyon, C.J., at page 1420 of the report said :

> " The defendant, a lad, wished to ride the plaintiff's mare on a short journey ; the plaintiff let him the mare to hire ; and in the course of the journey an accident happened, the mare being strained."

If the injury to the mare was an accident the basis of liability, if any, must have been negligence. The duty to take care arose out of the contract of hire, out of the duty owed by a bailee to a bailor. The liability of negligence in tort had to rely on the duty to take care arising out of the contract. This case can therefore be clearly distinguished from *Burnard's* case and *Walley's* case where the act complained of amounted to a trespass and was not founded on a duty to take care arising out of the contract of bailment. Lord Greene, M.R., in *Ballett's* case was able to distinguish that case clearly from *Jennings*' case, because the minor in *Ballett's* case by parting with the article hired to a third person had, to use Lord Greene's words, " stepped outside the bailment altogether ".

In the present case the appellant sought to establish as a term in the contract of hire that the car was hired to go

to Larnaca, that the minor took it beyond Larnaca to Famagusta and while so doing met with the accident the cause of this suit. If this allegation were correct it might well be argued that the accident had occurred when the minor had taken the article hired outside the contract of bailment. But in fact the lower Court have held that the contract was merely that the minor would pay 5½*p*. a mile for the use of the car and that even though he had said that he intended to go to Larnaca this statement was not a term in the contract.

The action in tort must therefore be founded on an act of negligence, an accident which was the result of driving a car at an excessive speed. The duty to take care, whether the action is brought in tort or in contract, arises out of the contract of bailment: namely the duty of a bailee towards his bailor to use reasonable care. The alleged tort therefore in this case cannot be said to be independent of the contract. In my view the trial Court was right in holding that the proviso to section 8 of the Civil Wrongs Law applies in the present case, namely, that the civil wrong arose out of the contract.

This appeal must therefore be dismissed with costs.

GRIFFITH WILLIAMS, J.: This is an appeal from a judgment of the President, District Court, Nicosia, dismissing the appellant's claim. The action arose out of the hire by the respondent, an infant, of a motor car from the appellant on the 29th January, 1951, to drive to Larnaca. There was some conflict of evidence as to the exact terms of the hire, particularly as to whether the length of the journey was restricted to Larnaca and back; the Court held, however, that this did not constitute a term of the contract, and that, apart from all the conditions attached by law to contracts of this kind, the only agreed term was that the respondent must pay 5½*p*. per mile for the hire.

The respondent drove the car to Larnaca where, according to his own evidence, he took it to a garage, and there had the speedometre disconnected. Whether this means that the speedometer henceforth would not record the miles covered or that it would in addition to that cease to indicate the speed of the car does not appear from the evidence. From there the respondent set out to drive to Famagusta, and on the way met with an accident which caused damage to the car amounting to £286. 6*s*.

It is admitted that had the respondent been an adult person he would have been liable under his implied contract as a bailee in accordance with section 160 of the Contract Law (Cap. 192); but that as he was only 16 years old he was not competent to contract under section 11 of that law and could not be held liable. In consequence of this the appellant sued him in tort, seeking to prove that the damage

done to the car was caused by the respondent's negligence, and that it did not arise out of the contract of hire. In order to recover in tort it would be necessary for the appellant to prove that the tort for which respondent was liable did not come within the proviso to section 8 of the Civil Wrongs Law. The section is as follows:

"A person under the age of 18 years may sue, and subject to the provisions of section 9 of this Law, be sued in respect of a civil wrong. Provided that no action shall be brought against any such person in respect of any civil wrong where such wrong arises directly or indirectly out of any contract entered into by such person."

The proviso to this section was introduced to afford similar protection to infants to that given in England by the Common Law. There it has been established that if the cause of action ought rightly to be laid in contract, an infant cannot be made liable by framing the action in tort.

The Court below, though it did not make a specific finding as to negligence, held on the evidence of respondent himself, that the accident happened because the car left the road owing to high speed and struck a tree 45 feet from the road, thereby sustaining extensive damage. Throughout the hearing it seems to have been taken for granted that the respondent was driving at the time of the accident and that the accident was due to the negligent way he did so. No attempt was made to disprove negligence and it was not an issue on appeal; the substantial defence being based on section 8 of the Civil Wrongs Law (Cap. 9) already quoted. It was contended for the respondent that he was not liable in tort for negligence as it arose directly or indirectly out of a contract.

The Court below, after going at considerable length into the law applicable, came to the conclusion that the case fell within the principle laid down in the English case of *Jennings* v. *Rundall*, 1799, 8 T.R. 335, 101 Eng. Rep. 1419—holding that the respondent's civil wrong negligence arose directly or indirectly out of the contract of hire he entered into with appellant, and consequently dismissed the appellant's claim. It has not been suggested to us that there is any difference in principle in the proviso to section 8 of the Civil Wrongs Law, and that contained in the English Common Law. Indeed in order to understand the meaning of "a wrong arising directly or indirectly out of a contract" it is necessary to consult the English case law. The phrase "arising directly or indirectly out of a contract" is not used in the English cases which speak only of rights arising *ex contractu* or of a wrong within the four corners of a contract, but there is no room for doubt that the words used in section 8 were for the purpose of incorporating the protection of infants given by the Common Law, and of doing so without exceeding it.

The Common Law principle is clearly set out in Pollock on Contracts (8th Edition p. 78) as follows :

" He (the infant) cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract . . . . . But if an infant's wrongful act, though concerned with the subject matter of a contract, and such that but for the contract, there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act contemplated by it, then the infant is liable."

This passage is quoted with approval by Atkin, J., in *Fawcett* v. *Smethurst* (1914, 84 L.J., K.B. 473 at p. 475) a case in some respects like the present. There an infant hired a motor car for a journey of six miles to a specific place and back ; but meeting a friend he picked him up and drove him to a place some 12 miles further on. During this extended journey the car was damaged beyond repair without negligence on the part of the infant, defendant. It was held that defendant was not liable in tort as his act of taking the car further than contemplated in the contract did not make him a trespasser so as to render him liable without default on his part. It would seem from this case that if the respondent had in breach of his contract taken the car on the Larnaca—Famagusta road, he would have been liable for damages ; as he would already have broken his contract and consequently would be liable in tort for negligence. The Court have held that the respondent had a contractual right to drive the car on the Larnaca—Famagusta road that day.

The same principle is stated in Halsbury's Laws of England, 2nd Edition, XVII, at p. 620 :

" An infant is not liable for a tort which is founded on a contract in which he cannot be sued, as in the case of a warranty of a horse, or for a fraudulent representation as to his age, which induces a party to contract with him; but he is liable for any tort which, though connected with the subject matter of a contract, is a separate and independent act of a kind forbidden or not contemplated by the contract, or if the action in substance arises *ex delicto*."

A case in which the action was held to be *ex contractu* was *Cowern* v. *Nield* (1912, 2 K.B., 419). An infant trader who sold goods to a purchaser was paid the price but failed to deliver. In an action for money had and received it was held that even though the contract was for the infant's benefit the purchaser could not succeed, unless he could prove that in substance the cause of action arose *ex delicto* i.e. fraud. In this case the judgment of Lord Kenyon in the old case of *Bristow* v. *Eastman* was cited with approval.

Lord Kenyon held that an action would lie against an infant to recover money which he had embezzled. The decision was based on the fact that it was in substance an action *ex delicto*.

The authorities I have so far quoted suggest that the criterion for deciding whether or not an action would lie against an infant in tort which against an adult might be brought either in contract or tort is whether or not the act was in substance *ex contractu* or *ex delicto*. The case of *Jennings* v. *Rundall* on which the trial Judge relied in his judgment was an early authority in favour of the infant, deciding that the tort—in that case negligence—as in the present—arose *ex contractu*. The facts shortly were that an infant hired a mare to ride for a short journey in the course of which, through negligent riding of the mare, he damaged it. The owner of the mare knowing that he could not recover in contract sued the infant in tort. The Court however found for the infant, holding that there was a duty to take care inherent in the contract of hire and that, consequently, the appropriate cause of action was in contract.

What would appear on the face of it a very similar case had a very different result. In *Burnard* v. *Haggis* (1863) 14 C.B. (N.E.) 45, the defendant a young man under 21 years hired a mare for riding; in breach of his agreement he lent her to a friend for jumping and so injured her. It was held that the defendant was liable in tort notwithstanding the fact that it was at the same time a breach of non-actionable contract. The case was approved and followed in *Walley* v. *Holt* (1876) 35 L.T. 631, in which a minor hired a horse and injured it by over-driving. Unfortunately we have no copy of the report in the latter case. In the case of *Ballett* v. *Mingay*, 1943, K.B. 282, the Court of Appeal in following the decision in *Burnard* v. *Haggis*, had no difficulty in distinguishing the case of *Jennings* v. *Rundall*; and so the latter still seems to be good law. In view of this it is difficult to understand the opinion expressed in a note to Salmond on Torts (p. 61 note q. et seq.) that the case of *Jennings* v. *Rundall* was wrongly decided and that the decision would seem to be directly in conflict with the later cases of *Burnard* v. *Haggis* and *Walley* v. *Holt*. The note goes on:

> "An attempt is sometimes made to reconcile them by drawing a distinction between torts which are merely wrongful modes of performing a contract and torts which are outside the contract altogether. This distinction however seems a merely verbal one, having no logical basis or substance in it . . . . It is submitted that *Jennings* v. *Rundall* is a mistaken application of a correct principle—namely, that if the act of a minor is in reality merely a breach of contract he cannot be made liable by being sued in tort instead."

I have set out this passage at length because it has been submitted to us, and is indeed a ground of appeal, that *Jennings* v. *Rundall*, on which this case was decided in the lower Court, was not an authority. The following passage of Salmond in the middle of page 61 may also have had something to do with evoking this ground of appeal:

> " When the act of a minor is both a tort and a breach of contract is he liable in tort, notwithstanding that the contract is not binding on him, or does his exemption from an action for breach of contract protect him against an action for the tort also? On this point the Law cannot be regarded as settled, but the better opinion would seem to be that in such cases liability for the tort exists, and that it is no defence that the act was also the breach of an invalid contract ".

Salmond would appear to disagree with the distinction, made by the Judges in *Fawcett* v. *Smethurst* and *Cowern* v. *Nield* already mentioned, between causes of action which arise *ex contractu* and *ex delicto*. The Judges in *Burnard* v. *Haggis* had no difficulty at all in deciding that the damage done to the mare was *ex delicto*; as it was not merely the negligent use of the property subject to the bailment. They said the tortious act in that case amounted to trespass; and trespass could scarcely be held to be within the four corners of a contract of bailment. In *Jennings* v. *Rundall* the action was in tort for negligence; but every contract of bailment imports a duty on the bailee to take the same care of the thing entrusted to him as he would take were it his own property. If the thing bailed is damaged through negligence of the bailee there is a breach of contract; but if the bailee is an infant he cannot be sued on it.

In the recent Court of Appeal case of *Ballett* v. *Mingay* (1943, 1 K.B. 281) in which the cases of *Jennings* v. *Rundall* and *Burnard* v. *Haggis* were distinguished, Lord Greene, M.R., described the negligent riding of the mare by the infant in *Jennings* v. *Rundall* as being " within the four corners of the contract " so that if he rode it negligently and damaged it the action in substance would be one in contract. In *Burnard* v. *Haggis*, however, the infant who hired a mare for riding, when he lent the mare to a friend for jumping, went altogether outside his contract and was therefore rightly sued in tort. The case of *Ballet* v. *Mingay* arose out of the hire of an amplifier and a microphone. The defendant, an infant, instead of returning them parted with possession to a third party. The Court of Appeal held that he was rightly sued in detinue, as by wrongfully parting with possession he had stepped outside the contract of bailment.

In the case of *Leslie Ltd.* v. *Sheill* the defendant by fraudulently representing that he was of full age induced the plaintiffs to lend him a large sum of money. An action

brought against him for fraud succeeded in the lower Court, but on appeal Lord Sumner in his judgment stated, " although an infant may be liable in tort generally he is not answerable in tort directly connected with a contract, which, as an infant, he would be entitled to avoid—one cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto* ", as stated by Byles, J., in *Burnard* v. *Haggis*.

It would appear that no intention permanently to deprive the plaintiffs of their money was proved in this case, but only the fraudulent representation by the infant that he was of full age, in order to induce the contract. Were it otherwise it would be difficult to distinguish it from the old case of *Bristow* v. *Eastman* already mentioned, where an infant was held liable for embezzlement.

In the present case there is a finding of the lower Court that the respondent committed no trespass in taking the hired car onto the Larnaca—Famagusta road ; and that whatever the purpose of the alteration effected to the speedometer it did not affect the respondent's right under his contract to drive the car on that road. This being the case the only action that would lie against the defendant-respondent (if an adult) would be in contract, for failure of his contractual duty as bailee to take proper care of the property entrusted to him, namely, the motor car. His negligence was within the four corners of the contract. In the relationship, as then existing between the appellant and respondent, no negligence could arise in the circumstances other than the neglect to take proper care under the contract. It is obvious therefore that the appellant's rights were only *ex contractu*, or that the negligent act arose directly or indirectly out of the contract and that the respondent was completely protected from proceedings in tort by the proviso to section 8 of the Civil Wrongs Law (Cap. 9).

For the aforesaid reasons I think this appeal should be dismissed with costs.