

THE ESSENCE OF A BAILMENT: CONTRACT, AGREEMENT OR POSSESSION?

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"In all bailments," T. A. Street wrote in his *Foundations of Legal Liability*,¹ "possession is severed from ownership."² He continued:

Under the theory of the common law, every bailee has true possession as distinguished from mere custody. The nature of the ownership inhering in the bailor may sometimes, especially in early law, become a matter of inquiry and it may sometimes appear to be almost non-existent; but there can never be any doubt that the bailee has true legal possession. It should further be observed that in all true bailments delivery is made with the consent of the owner, a circumstance which supplies one of the requisites of a contractual relation. It is doubtless this circumstance which makes the physical custody of the bailee an instance of true legal possession.

The material in the first paragraph of this passage, taking in the footnoted clarification, is not the subject of dispute. No-one has denied that the passing of possession is a necessary element in bailment. Neither has anyone denied that bailment requires the bailee to have what Street—in my view, unhappily—calls "true legal" possession, that is, rightful or lawful possession. The possession of the bailee is and must be distinguished from the possession of the owner and that of the thief by the fact that the bailee as bailee makes no accompanying claim to or assertion of *dominium*, but accepts a continuing interest of a previous owner or possessor. Street, however, takes the matter further. For him, a "true" bailment also requires a delivery made with the consent of the owner. (It is this belief that leads Street to emphasise ownership in such a way as to give the false impression that bailment is necessarily a relationship between an owner and a bailee who is not the owner.) This view is certainly a common one: it can be expressed more generally as the view that bailment requires not only a passing of possession, but also an agreement between the bailor and the bailee. Some of the highest authorities—for example, Blackstone,³ Jones⁴ and Story⁵—went even further to insist that bailment must be based upon a contract, either expressed or implied.

In recent times, however, there has been growing criticism of both the

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¹ Thomas Atkin Street, *2 Foundations of Legal Liability* (New York, 1906) at 252. The division into paragraphs is mine.

² Severed, as Street no doubt meant, conceptually but not necessarily physically, since the owner of a chattel may also become bailee of the chattel. A hirer or other bailee for a term may, during the term, bail the chattel to its owner and impose on that owner a duty to redeliver. It might be better to say, "In all bailments the bailee's right of possession is not based on a claim of ownership".

³ "Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee": *2 Bl. Comm.* (13 ed., 1800) at 451.

⁴ "... that contract which lawyers call bailment, or a delivery of goods on condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered": Sir William Jones, *An Essay on the Law of Bailments* (London, 1833) at 1, cf. 117.

⁵ "... a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust": Joseph Story, *The Law of Bailments* (3 ed., Boston, 1843) at 4.

contractual and the consensual view of bailment and a growing tendency to distinguish contractual and consensual elements surrounding a bailment from the bailment itself.⁶ It shall be the argument of the first portion of this paper that this tendency represents not a further new development in the law of bailment but an interesting and fruitful return to the original foundations from which the law of bailment took its departure, and which became obscured by subsequent historical developments largely accidental in form. In the remainder of this paper, I shall argue that such a return—supported by and supportable from a significant number of decisions—would both clarify and rationalise the law pertaining to bailments.

The superficial plausibility of the contractual-consensual view of bailment rests on the initial use of the term bailment to qualify a subdivision of detinue and on certain extraneous alignments in the subsequent history of the forms of action. *Consent* to the passing of possession by the bailor (that is, a "delivery" in the narrow sense) and an express or implied *agreement* between the parties for the redelivery of the chattel in question were the two elements that had to be alleged and proved in an action on detinue *sur bailment*. The allegation and proof of these elements distinguished detinue *sur bailment* from the more general type of pleading in detinue, the early detinue on a *devenerunt ad manus* and its later modification, the detinue *sur trover*. In pleading on a *devenerunt ad manus*, or later *sur trover*, the owner of the chattel alleged no specific delivery and no express or implied agreement between him and the defendant. He merely stated that the chattel was his, that it had come into the hands (*devenit ad manus*) of the defendant, that the defendant had been informed that the chattel was the plaintiff's and asked to redeliver and had refused or failed to do so. It should be noted from this that the situation described in a pleading in detinue *sur bailment* is not one outside the situations dealt with on a *devenerunt ad manus*; it is simply a special, stronger case of the general type of detinue-situation. The initial argument for, and plausibility of, making consensual delivery and agreement between the parties necessary for bailment is thus purely etymological. The etymological argument was psychologically reinforced by the first of a number of relevant historical accidents. Littleton had laid the foundation for detinue *sur trover* in 1455; the pleading soon separated off into the independent action of trover, where the focus of interest was the strength of competing claims to title. Detinue and detinue *sur bailment* (the latter being all that remained of detinue once the pleading *sur trover* had been drawn off) now appeared to be one. It was not unnatural to forget that detinue as such had required neither consensual delivery nor agreement between the parties.

The emphasis on the consensual elements in detinue *sur bailment* as containing the key to bailment was further reinforced by another development in this period — the emergence of a new action on the case, *assumpsit*. The action began as a preliminary declaration in the writ in an action on the case, declaring that the defendant had undertaken to do something. It thus covered, and provided a different remedy (damages) for, all those situations with which detinue *sur bailment* was concerned, but stressed the element of undertaking within them. In the early history, however, promises became enforceable by having been made as part of a situation analogous to situations recognised by the earliest forms of action as imposing legal duties. Generally speaking, this meant that there had been either the passing of possession in

⁶ E.g., in Joseph H. Beale, Jr., "Gratuitous Undertakings" (1891-2) 5 *Harv. L.R.* 222; C. V. Davidge, "Bailment" (1925) 41 *L.Q.R.* 433; William King Laidlaw, "Principles of Bailment" (1930-1) 16 *Cornell L.Q.* 286; *Williston on Contracts* (New York, 1936) ss.1032, 1035 esp.; also — more ambiguously — P. H. Winfield, *The Province of the Law of Tort* (Cambridge, 1931) 100f. and George Whitecross Paton, *Bailment in the Common Law* (London, 1952) ch. 1.

a chattel on a certain understanding or an undertaking to do something which had then been done badly. Looking at the situation from the Roman point of view,⁷ we may say that English law (excluding the action of covenant) began with the contract *re*, of which the bailment upon delivery and agreement is a special but exceedingly common case. As the English law of contract moved with the realities of English economic life to seeing the essence of contract in an economic bargain rather than in the passing of a chattel or in the doing of a task, the contract *consensu* came to replace the contract *re* as the paradigm. By this time, it was not at all obvious that bailment, even when accompanied by an express agreement, fell necessarily under the contract model. It was put there — as we shall see, somewhat uncertainly — by a historical development, partly influenced by the older and more plausible connection between bailment and the contract *re*. The development has been sketched for us by Beale:

There seems at one time to have been a threefold division of personal actions into (1) trespass and trespass on the case; (2) case induced by *assumpsit*; (3) covenant. Actions on the case induced by *assumpsit* included not only breaches of simple contracts, but also breaches of gratuitous undertakings, which therefore in their origin are more nearly allied to simple contracts than to torts. When those actions in which the *assumpsit* was merely an inducement were differentiated from those in which it was the gist of the action, the former would properly have united with the old action of detinue, founded on bailment, to make the grand division of undertakings; just as the latter united with actions of debt and covenant to form the grand division of contracts. Bailments, however, were after a struggle drawn off into the division of contracts; and the few other cases of undertaking then known, not being of sufficient importance to form a separate division, either followed bailments, or with other actions on the case sank back into the division of torts. This fact, singular as it is, may be accounted for by the well-known early neglect of all rights that did not concern tangible property. Injuries to intangible property might, it is true, be redressed after the Statute of Westminster II by an action on the case. But the recognition of such injuries was a gradual process; and before such as were in the nature of breaches of undertaking were recognised, the twofold division of actions was fully established.⁸

It is in the light of this historical development that courts and 19th century legal writers emphasized the element of consensual delivery, "one of the requisites", as Street put it, "of a contractual relation". Bailments might have been put even more firmly within the class of contracts if the 16th century introduction of consideration as a requirement of contract, and the 17th century refinement of it, had not raised very great difficulties in treating such gratuitous bailments as mandates and deposits as establishing a contractual relation. The continuing difficulty of doing so, of course, is one of the still valid arguments against the contractual view and it explains the vacillation and uncertainty that have characterised the subsequent treatment of bailment. The very cases that encouraged the contractual view of bailment on closer examination betray the difficulty of taking it. In *Coggs v. Bernard*,⁹ the Court unanimously rejected counsel's plea that no action lay against a bailee undertaking to carry because there had been no reward. The Court, however, did

⁷ As S. J. Stoljar has done in his "The Conception of Bailment" (1955) 7 *Res Judicatae* (now *University of Melbourne L.R.*) 160. The article makes interesting connections between certain types of bailment and certain problems arising in contract but it will be evident from what follows that I am unable to accept Dr. Stoljar's generally contractual approach to bailment.

⁸ Beale, *op. cit.* at 225.

⁹ (1703) 2 *Ld. Raym.* 909, 92 *E.R.* 107.

not display unanimity in its treatment of the reasons. Gould and Powell, JJ. brought the matter back to its old foundations in detinue and earlier *assumpsit* in case. Powell, J. argued that the bailee's undertaking was enforceable because it was given in conjunction with, and as the foundation for, the bailor's entrusting him with the goods. This was just, it seemed to the learned judge, since, "if the bailee will take the goods into his custody, he shall be answerable for his own act".¹⁰ Gould, J. returned to the old cause that the defendant had undertaken to do and had done badly (that is, the form of *assumpsit* distinguished from the one on which Powell, J. relied, but also one that required no consideration). The bailee, he said, "by his assumption" of the goods, had concurred in "the particular trust . . . in the executing which he has mis-carried by his neglect".¹¹ Both judges did not suggest that there was consideration and thus made no attempt to force gratuitous bailments within the realm of contract: they seemed, rather, to regard them as enforceable undertakings that need not be contracts. The reasons they gave are perfectly consonant with the non-contractual, non-consensual view of undertakings — including the undertaking in a gratuitous bailment — suggested by Beale:

An undertaking is the entrance of two parties into such relationship as that one party, on account of the bare relationship unaided by any agreement, has a new duty to perform toward the other; he *undertakes* a new duty.¹²

The older view of bailment as an undertaking (very much in the sense defined by Beale) within the action on the case also played its part in the judgment given by Holt, C.J., but in a crucial sentence the Chief Justice went beyond the old law to give lasting aid and comfort to future contractualists. "But to this (that there is no consideration to ground this promise upon) I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."¹³ In substance, however, Holt, C.J. held no more than Powell and Gould, JJ., that the passing of these goods in these circumstances was sufficient to create an enforceable duty. He went on, however, to discuss the bailment before him from the point of view of executory agreements, and there can be little doubt that the Chief Justice himself was satisfied that his argument that the passing of a chattel is itself a consideration had brought the law of bailment entirely within the law of contract.

Holt, C.J.'s words bore full fruit only a century later. The economic developments that produced the treatment of contract as the law of bargains later had wider political-ideological effects: the men of the 19th century strove to find contract everywhere. Story, in his classic work on *Bailments*, argued that in mandates and deposits there was sufficient consideration by "the bailor yielding up his present possession, custody and care of the thing to the bailee, upon the faith of his agreement, or promise to redeliver it. . . . A detriment, or parting with a present right, or delaying the present use of a right on the part of the promisee, is a sufficient consideration to support a contract by the promisor, although the promisor derives no benefit whatever from it."¹⁴ Others have emphasised "the confidence reposed in the person who

¹⁰ At 911, E.R. at 108.

¹¹ At 909, E.R. at 107.

¹² Beale, *op. cit.* 223. It should be admitted that the two judges laid considerable emphasis upon "warranty", and were influenced by contractual notions in doing so, but we might argue that this was relevant to the determination of the precise extent of the duty and not necessary for bringing it into existence, on their own showing.

¹³ At 919, E.R. at 113.

¹⁴ *Op. cit.* 4, n.1. In *Bainbridge v. Firmstone* (1838) 8 A. & E. 743, 112 E.R. 1019, another case of gratuitous bailment, the Court held that there was sufficient consideration in the plaintiff's permitting the defendant to take and weigh certain boilers: "I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time": *per*

undertakes the duty"¹⁵ as providing the element of consideration.

In recent times, as we have mentioned, these views have been increasingly challenged.¹⁶ Pollock thought that in the contractual treatment of gratuitous bailment, the theory of consideration was being stretched to its utmost limits, but did not break;¹⁷ other writers have thought it clearly breaks. Story is no doubt correct in stressing that the consideration need not be a benefit to him who receives it, but he is far too cavalier in his treatment of the question of detriment. To treat the passing of any chattel, or the most temporary surrender of any present right, as itself necessarily involving a detriment is to rob the criterion of detriment of any limiting force. When I pass on to another the trouble of caring for a thing from which I extract no immediate benefit or enjoyment whatever, and yet keep my rights to all future benefit or enjoyment, I cannot meaningfully be said to suffer detriment, prejudice or trouble.

If one were to abandon, as many modern writers do,¹⁸ the insistence that there is technical consideration in all "true" bailments, it would still be possible to pass, as some writers do, from the contractual to the consensual view of bailment as founded on agreement between the parties. But this view is as implausible as the contractual view in its treatment of bailment by finding and of "involuntary" bailments; if agreements are not to become the baldest of fictions, these important parts of the law of bailment have to be distinguished from it and treated as not "true" but as "quasi-" bailments. But in respect of the essential foundation of legal liability, such alleged "quasi-bailments" differ in no respect whatever from the allegedly "true" bailments. It is the recognition of this point that has led some modern writers to insist on the unity of the law of all bailments as a subject *sui generis*. A bailment, they say, may have both contractual and tortious features, but it has its own character precisely because it belongs to neither contract nor tort.¹⁹ In what follows, I should like to suggest yet another alternative: that the foundation of the bailee's duty, as distinct from its nature and extent, is in no way rooted in mutual agreement. The law of bailment, therefore, properly speaking, belongs within the realm of torts.

In 1312, in the case of *Lyndesey v. Suth*,²⁰ the plaintiff, as heiress to her grandfather, claimed in detinue a charter from the defendant, declaring that after her grandfather's death, the charter had "come into the seisin" (*devenit in seisinam*) of the grandfather's second wife who had in turn delivered it to the defendant. The defendant pleaded that the charter had been given

Patteson, J. at 744, E.R. at 1020. See also *Hart v. Miles* (1858) 4 C.B. (N.S.) 371, 140 E.R. 1128.

¹⁵ Per Lord Finlay, L.C., in *Banbury v. Bank of Montreal* (1918) A.C. 626 at 657.

¹⁶ See n.6.

¹⁷ (1886) 2 L.Q.R. 37, in an editorial note to Erwin Grueber, "A Difficulty in the Doctrine of Consideration", *vol. cit.* 33, where Grueber puts very clearly the argument we shall be using shortly: that "the fact of leaving things with another person in order to have them or their value preserved" need not be a *benefit* to the person receiving, and, *in the given circumstances*, may be an *advantage* to the person parting with them: see esp. 35.

¹⁸ E.g., Ralph Sutton in Halsbury's 2 *Laws of England* (3 ed., London, 1953) 93f. and D. R. Harris in 2 *Chitty on Contracts* (22 ed., London, 1961) 72f. Both writers consequently divide bailments into gratuitous bailments and bailments for reward, a division whose significance lies, for them, in its effect on liability. Charles E. Cullen, "The Definition of a Bailment" (1926) 11 *St. Louis L. Rev.* 257, had earlier attempted to argue that bailments were contracts, but dispensed with both consideration and agreement and found the contractual essence in mutual obligations that might be created by the operation of law and not only by agreement of the parties.

¹⁹ This is the view taken by Paton, *op. cit.*, leaning on Winfield's similar view, *op. cit.* 100f., that bailment is a "contract conveyance" and is therefore best treated as belonging to neither contract nor to tort but as forming a distinct branch of the law of property.

²⁰ Y.B. 6 Edw. 2 (S.S. vol. 34, 166-8), trans. in Fifoot, *History and Sources of the Common Law* 37-9. It is on Mr. Fifoot's valuable collection of a number of cases showing the development of detinue on a *devenirent ad manus* that I have based much of my earlier comments on this form of pleading.

her directly by the grandfather when he enfeoffed her of the estate in question. The plaintiff's reply was to traverse the feoffment and to repeat that the charter had come into the hands (*devenit ad manus*) of the second wife. In argument, Toudeby (for the defendant) objected that the plaintiff's count did not show that the plaintiff or any of her ancestors had *bailed* the charter to the defendant, and Scrope (for the plaintiff) replied:

If you disseise me and carry off my charters, and I bring my writ and demand these same charters, it is then no answer to my writ to say that I did not bail you any charter. Likewise if you should find my charters, you would answer for the detinue.

The count was allowed and the case was sent to the jury for a decision how the charter came into the defendant's possession, indicating that the action of detinue had been or was being bifurcated into detinue *sur bailment* and detinue on a *devenerunt ad manus*. In detinue *sur bailment* the plaintiff had to prove the bailment and that the defendant was party or privy to it, but if he declared on a *devenerunt ad manus* the process whereby the chattel had reached the defendant became irrelevant. As Green put it when arguing in *Thornhill's Case* (1344) upon a *devenerunt*:

In this action of Detinue you are put to answer as to your own act, which is the detinue, and not as to your testator's contract; for here you will not have a traverse as to his receipt nor as to the manner how (he received it), but only as to your detinue.

. . . .
In whatever way it came into your possession, whether as executors or because you took it out of the possession of some one else or because you found it, if you detain it, I shall have an action; wherefore, inasmuch as you do not answer to the detinue, which is the principal matter of the action, I ask judgment.²¹

Here, then, we have the non-contractual and non-consensual view of a person's liabilities in detinue. He may have admittedly legal possession of the chattel, but the chattel belongs to another or another has the better right to possess it. He has been made aware of the continuing right of another by a demand for delivery. He now has a duty toward the demandant, not because of any express or implied undertaking toward the demandant, not because of any agreement between them, but simply because he accepted the possession of a thing in which another had a continuing interest. Only if the defendant claims that he has a continuing right to detain do agreements and undertakings become relevant, not to the plaintiff's charge but to the defendant's reply. It is by entering into a relationship with a thing, and not by entering into a relationship with a person, that the defendant becomes subject to duties. It is thus that the finder has the same primary duty as the consensual bailee:

. . . for he which findes goods, . . . if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely.²²

Or, as an American court put it, even more generally:

No person can be compelled to become a depositary without his own consent; but there are cases where a person may be subject to the duties and liabilities of a depositary without any intention on his part to enter into any contract, or to assume any liability in regard to the property in question. The finder of property of a person unknown is not bound to interfere with it. He may pass by, if he please, and has

²¹ Y.B. 17 & 18 Edw. 3 (R.S.) 150, trans. by Fifoot, *op. cit.* 41 & 42.

²² *Per* Coke, C.J. in *Isaack v. Clark* (1615) 2 Bulstr. 306 at 312, 80 E.R. 1143 at 1148.

then no responsibility in relation to it; but if he takes it into his possession he becomes at once bound, without any actual contract and perhaps without any actual intention to bind himself to the owner of the property for its safekeeping and return.²³

The forms of action arise as remedies for specific types of recurring situations. The situational basis of the action of detinue generally, I have striven to show, is that the defendant has accepted into his possession a chattel or continues to hold in his possession a chattel in which he recognises the continuing interest of another. Detinue *sur bailment* is no more than a special case of this situation: a case in which the acceptance of possession is by consent of the deliveror and with agreement between the parties. But here, as in other types of detinue, the primary duty arises from the acceptance of possession.

We have seen that in the early law the term "bailment" was used to make a distinction within detinue. But this distinction, we have argued, has no fundamental importance in the law: consent and agreement between the parties help only to define the extent of the duty, they do not create it. The primary duty of a man who takes into his possession the chattel of another without challenging the other's title is the same whether he be a hirer, a borrower, a finder or an "involuntary" bailee: he has a duty to safeguard and redeliver. It is for this reason that the term "bailment" is most conveniently used not to cover delivery upon agreement, but to refer to that general situation in which a man has duties arising from his temporary possession of another's chattel. The law, indeed, has recognised this and has gradually come to use the word bailment (often without the hesitant "quasi-") for all the situations to which we have referred. As Williston put it:

A bailment may be defined as the rightful possession of goods by one who is not the owner It is usual to add as part of the definition of bailment that the bailee must be under a duty to redeliver the goods, but all that is essential is contained in the definition . . . (above), for one who has the right to permanent possession is necessarily the owner; and since one entitled to temporary possession only is under a duty, either present or future, to surrender the goods or their proceeds on demand or to seek the owner and deliver them to him, he is a bailee.²⁴

The customary distinction between the "grand divisions" of contract and of tort is made in these terms: a contractual duty is one which is owed to a specific person in consequence of an agreement entered into with that person; a tortious duty is one owed impartially to the whole world in consequence of entering into a specific situation, though it can be claimed upon only by those who have become linked with the duty-bearer through that situation. On this view, the primary duty of the bailee as set forth in these pages is a tortious duty: the duty of the bailee requires neither his agreement with, nor his knowledge of, the bailor.

The precise nature and extent of the bailee's duty, however, is another matter. Whether it be true, as Holmes,²⁵ Street²⁶ and Holdsworth²⁷ thought, that the liability of the bailee in early law was always strict, has become the subject of some dispute.²⁸ In modern law, there is no doubt that the

²³ *Costello v. Ten Eyck* (1891) 86 Mich. 348, 49 N.W. 152 at 153, 24 Am. St. Rep. 128. Thus, courts have held that persons legally incapable of entering into binding contracts or legally binding obligations with persons (such as infants and—at the relevant time—married women) were bound by the legal obligations of a bailee: *R. v. Robson* (1861) 31 L.J.M.C. 22 (married woman indictable as converting bailee); *R. v. McDonald* (1835) 15 Q.D.B. 323 (C.C.R.) (infant indictable for larceny as bailee), esp. the argument of Coleridge, C.J. at 326-7; *Burton v. Levey* (1890) 7 T.L.R. 248 (infant liable on detinue).

²⁴ Williston, *op. cit.* ss.1032 (at 2888) and 1035 (at 2891).

²⁵ O. W. Holmes, *The Common Law* (reprint, Boston, 1948) 167.

²⁶ Street, *op. cit.* 253.

²⁷ W. S. Holdsworth, 3 *History of English Law* (London, 1938), 337-8.

²⁸ Beale, "The Carrier's Liability" (1897-8) 11 *Harv. L. Rev.* 158; Hugh Evander

degree of liability imposed upon a bailee may vary according to the type of bailment and may be affected by the agreement existing between the parties. In *Southcote's Case*,²⁹ what Coke, C.J. took to be the strict liability of earlier law — "To be kept and to be kept safely is all one" — was initially reaffirmed, but the bailee was allowed to escape liability for theft if he had specifically undertaken to keep only as he keeps his own goods, Coke, indeed, recommending this device to any reader of the report inclined to become a bailee. Holt, C.J., in *Coggs v. Bernard*, *supra*, went further to throw the emphasis on various types of bailment, classified by him (again with support from earlier law) into *depositum*, *commodatum*, *locatio et conductio*, *vadium*, bailment for carriage or work to be done with reward and bailment for carriage or work to be done without reward. The significance of these, for him, was in defining liability. Though other authorities have reduced the number of relevant types, the link between type of bailment and liability has remained. Since the type of bailment is normally most easily determined from the agreements that surround the passing of possession, and since these agreements thus often become crucial in determining liability, courts and writers have not unnaturally been led to emphasise the contractual elements surrounding bailment at the expense of the tortious element that constituted it.

It would be mistaken, however, to treat the question of liability too formalistically. There are not simply different rules concerning negligence for each type of bailment: this becomes evident once we recognise that "negligence" means no more than absence of (the due or appropriate) care. As Montague-Smith, J. put it in *Grill v. General Iron Screw Collier Co.*:

The use of the term "gross negligence" is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence.³⁰

The degree of care required from the bailee depends upon the character in which he accepts possession of the chattel (as an ordinary man,³¹ as a banker with secured vaults,³² as a skilled workman experienced in dealing with this type of chattel)³³; it depends upon the purpose for which the chattel was bailed and upon any agreements or undertakings entered into by the parties, whether these be express or implied by the general circumstances of the transaction.³⁴ The division of bailments into various types is no more than

Willis, "The Right of Bailees to Contract Against Liability for Negligence" (1906-7) 20 *Harv. L. Rev.* 297; Percy Bordwell, "Property in Chattels" (1915-6) 29 *Harv. L. Rev.* 501, 731; and Eric C. M. Fletcher, *The Carrier's Liability* (London, 1932) 1, 6 and *passim*. S. J. Stoljar, "The Early History of Bailment" (1957) 1 *Am. J. Legal Hist.* 5 has recently re-examined the question, arguing that the courts were aware that a bailee could come to lose things while yet applying proper diligence and that there were separate lines of development in formulating principles of exoneration which later became submerged.

²⁹ (1601) 4 Co. 83b, 76 E.R. 1061.

³⁰ (1866) L.R. 1 C.P. 602 at 614.

³¹ As in *Shiells v. Blackstone* (1789) 1 H. Bl. 160, 126 E.R. 94, where the defendant, who had undertaken without reward to send some dressed leather out of the country and had caused its seizure by wrongly entering it at Customs as wrought leather, was found not to have held himself out as having any special skill in expediting and therefore not to be liable. In certain cases, however, the courts have held that a man doing something has a duty to exercise such skill as he has even if it be not known to the bailor: *Wilson v. Brett* (1843) 11 M. & W. 113, 152 E.R. 737: if a man bails me his car to drive in the belief that I have no more than ordinary skill, this does not absolve me from the duty to drive with the care and skill I have in fact acquired as a test-driver.

³² *Giblin v. McMullen* (1869) L.R. 2 P.C. 317 at 323-4.

³³ *Giblin v. McMullen*, *loc. cit.*

³⁴ As Ralph Sutton puts it:

It may perhaps be stated with equal truth and brevity that the bailee is required in every case to take that degree of care which may reasonably be looked for, having regard to all the circumstances; for example, if you confide a casket of jewels to the custody of a yokel, you cannot expect him to take the same care of it as a banker would.

Halsbury, 2 *Laws of England* 96. This is not to say that nothing the yokel does or fails

a convenient but rough classification of varying but recurrent bailment-situations according to obvious features bearing upon the amount of care expected.³⁵ The classification is not strict because within each type of bailment the known value of the thing deposited and the facilities known to be available to the recipient will affect the degree of care expected and may bring it above the degree of care required in other circumstances in a type of bailment that nominally sets stricter requirements. The courts increasingly tended to recognise this, as the cases cited show; the general trend is to bring the liability of the bailee back to the general tortious duty of exercising reasonable care appropriate in the circumstances, with the type of bailment, the agreement between the parties and the social responsibilities of special callings, such as those of innkeeper and carrier, forming the circumstances to which the care is to be appropriate.³⁶ All these matters, in short, do not go to the essence of the bailment or of the primary duty of the bailee; they are ancillary, surrounding circumstances determining the appropriate degree of care.

In the preceding, I have attempted to suggest, partly only in outline, the coherent basis for a law of bailment, a basis that has often been recognized by many of the courts. I should not wish to suggest that it has been recognized by all of them all of the time. The contractual view of bailment has had strong support and has determined or influenced decisions. It is some of these decisions that we shall now turn to consider.

A bailment, said the Court in *Wechsler v. Picard Importing Co.*,³⁷ "must be predicated upon some contractual relation". In that case, a swindler had induced the plaintiff to deliver goods to the defendant's room, which he shared with two co-tenants, in the defendant's name. The defendant being absent at the time of the delivery, one of the co-tenants accepted the goods. The second co-tenant, before the defendant's return, permitted the swindler to take the goods away after being persuaded that the delivery had been made in error. The Court held that the defendant was not liable because there was no bailment and that there was no bailment because there was no contractual relation between the parties. In an earlier case, *Krumsky v. Loeser*,³⁸ the Court took a similar view. A cheat, representing himself to be the defendant, had ordered goods to be delivered to the defendant's store. The goods were sent by an expressman and received under the mistaken assumption that they had been ordered. Before the mistake was discovered, the cheat telephoned the store, representing himself to be the plaintiff-supplier, and explained that the goods had been delivered to the defendant by mistake and that a

to do is negligence. In *Doorman v. Jenkins* (1834) 2 Ad. & El. 256, 111 E.R. 99, a coffee-house keeper was held liable for the loss of money deposited with him when it was stolen through being left accessible to the public, even though it was thus left together with his own money.

³⁵ *Beal v. South Devon Railway Co.* (1864) 3 H. & C. 337, 159 E.R. 560:

What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper conduct of similar business for which he receives payment.

Per Crompton, J. at 343, E.R. at 562.

³⁶ Thus even "gross negligence", specifically linked with gratuitous bailments, has been regarded by some courts as nothing more than negligence plus "a vituperative epithet" (*per* Rolfe, B. in *Wilson v. Brett supra* supported by Willes, J. in *Grill v. General Iron Screw Collier Co. supra*; cf. Lord Denman, C.J. in *Hinton v. Dibbin* (1842) 2 Q.B. 646 at 661, 114 E.R. 253 at 258). Others see it as lack of the very lowest degree of care, and some have emphasised that the degree of care may be so low that lack of it approaches *dolus* (for instance, Erle, J., in *Cashill v. Wright* (1856) 6 E. & B. 891, 119 E.R. 1096 at 1099). American courts have been reluctant to accept the waiving of liability for gross negligence by agreement, and in doing so have treated it not as lack of the lowest degree of care, but as something approaching a wilful act. (See Willis, *op. cit.*)

³⁷ (1916) 94 Misc. 157, 157 N.Y. Supp. 803 (Sup. Ct. 1916).

³⁸ (1902) 37 Misc. 504, 75 N.Y. Supp. 1012 (Sup. Ct. 1902).

messenger would be sent to collect them. A messenger arrived, presented a forged order, received the goods from the defendant, and the goods and messenger were heard of no more. The Court dismissed the plaintiff's claim that the defendant was a bailee of the goods liable for negligent misdelivery on the grounds that there could be no bailment where there was no contractual relation, express or implied, between the parties.

In *Coons v. First National Bank of Philmont*,³⁹ this final proposition was taken very far indeed. The plaintiff had deposited certain securities in the safe-deposit box of the defendant, hired by her father, and they had been stolen from the box by burglars. Though the Court was prepared to regard property put in the box by the father as bailed to the Bank, it denied the plaintiff relief on the ground that she had no contractual relationship with the Bank whatever, and therefore could not make the Bank a bailee. As the Court put it:

The relation between a bailor and a bailee is fixed by contract, either express or implied, and the rights and liabilities of the parties must be determined from the terms of the contract, if express, or, if implied, under the general principles of law and the surrounding and attendant circumstances; but always liability is grounded in contract; one cannot be made the bailee of another's property without his consent. . . .⁴⁰ It follows that, if there is no contract between the parties to the action, there can be no liability resting upon the defendant as bailee.

In *Cowen v. Pressprich*,⁴¹ on the other hand, the Court took the non-contractual view of bailment, purporting to follow *Hiort v. Bott*.⁴² The plaintiff and defendant were security brokers, and the latter had ordered from the former an X bond. By mistake the plaintiff sent a Y bond by one of his runners, who arrived in the defendant's office and deposited the bond by dropping it through a slot in a partition in an inner office, the normal arrangement for depositing. The defendant promptly noticed that the wrong bond had been delivered, opened a hole in the partition and called for the runner. An impostor stepped forward, received the bond and decamped. The Court held that the defendant had entered into (an involuntary) bailment and that he was liable for negligent misdelivery. The same concept of involuntary bailment had been accepted by the English courts even earlier. In *Heugh v. London & North Western Ry. Co.*,⁴³ the defendants were carriers forwarding and delivering goods consigned by the plaintiffs, who, induced by the fraud of N, had consigned the goods to a certain address. The person in charge at the address refused to take delivery; the defendants brought the goods back to the station and notified the plaintiffs by letter. The defendants were induced to part with the goods to N when he came before them bearing their letter of notification. The same circumstances occurred in respect of two further similar consignments, except that N, who was now known to the defendants as having brought the first letter of notification, was allowed to take the subsequent consignments without the subsequent letters. In the circumstances, the plaintiffs were understandably anxious to rely on the strict liability of the carrier: the Court held that "the defendants' character of carriers had ceased, and whatever character they fulfilled it was not that. Their position has been not inaptly described as that of involuntary bailees; without their own fault they found these goods in their hands, under circumstances in which the character of carriers under which they received them

³⁹ (1926) 218 App. Div. 283, 218 N.Y. Supp. 189 (3rd Dept.).

⁴⁰ Note the confusion of contract and consent, and note that the statement would be true only if the consent spoken of were that of the recipient.

⁴¹ (1922) 192 N.Y. Supp. 242 (Sup. Ct., App. T.).

⁴² (1874) L.R. 9 Ex. 86, to be discussed below.

⁴³ (1870) L.R. 5 Ex. 51.

had ceased".⁴⁴ In terms of the lower duties of care imposed on an involuntary bailee, the Court held that the misdeliveries, based on the initial production of a letter of notification were not negligent.

Generally, then, we may say again, with the Court in *Foulkes v. New York Consolidated R.R.*, which held that leaving articles in a railway carriage creates a bailment to the proprietors:

Bailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not.⁴⁵

We are now in a position to reappraise the decisions in the cases of *Coons*, *Krumsky* and *Wechsler*, cases here considered, of course, only for their illustrative value. They are otherwise of no importance. In *Coons' Case* the Court passed, as a result of contractual preconceptions, from the correct proposition that the bank could not become the bailee of X's property unless it accepted *that property* to the incorrect proposition that it could not become a bailee of X's property unless it accepted it *as X's property*. But if allowing articles to be placed in the safe-deposit box constitutes the acceptance of possession by the bank, then such articles become bailed to the bank whether it knows the owner or not and the initial liability of a bailee *qua* bailee applies. When such liability is modified, as it may have been in this case, by ancillary contracts and conditions, two questions arise. The first question is whether the bailor is privy to these contracts: the sole fact that his goods have been accepted into bailment need not make him so.⁴⁶ If he is not privy to these special contracts and agreements, his claim is limited to the general liabilities in an ordinary bailment under those circumstances. The second question, which might have arisen in *Coons' Case*, is whether the agreements and conditions specifically exclude certain property, for example, that of non-customers, from *acceptance* by the bank, so that it becomes no more than property left by a trespasser. Such property is bailed and subject to liability, however, if the bank — under whatever misapprehension — takes it into its control.⁴⁷

There is little of interest in the decision in *Krumsky's Case*; in so far as it denied the existence of a bailment it was simply mistaken. The defendant received the goods, took them into his control and (mis) delivered them; that, surely, is bailment.⁴⁸ Saying this, one could still agree with the Court

⁴⁴ At 56-7, *per Kelly*, C.B.; also see *Martin*, B. at 58. In the Note to *Cowen v. Pressprich* in 35 *Harv. L. Rev.* 873, an involuntary bailee is defined as one who "when goods are thrust unexpectedly upon one under circumstances which make it impossible for him to decide whether or not he will take them into his possession".

⁴⁵ (1920) 228 N.Y. 269 at 274, 127 N.E. 237 at 239.

⁴⁶ This was the question in *Andrews v. Home Flats Ltd.* (1945) 2 A.E.R. 698 (C.A.), where the respondent, the wife of a tenant living in a block of flats owned by the appellant company, deposited a cabin trunk in a baggage room provided for the use of tenants. The trunk was taken to the room by servants of the appellant company, but no specific charge was made for the deposit and no ticket or receipt was issued. Two years later the trunk could not be found. It was held in the county court and upheld in the Court of Appeal that the appellant company was a *bailee for reward* in respect of the wife's deposit and, on the facts, negligent in having no system to prevent misdelivery. In response to the argument that the rent was paid by the husband, and that the company was therefore a gratuitous bailee in respect of the wife, the Court held that tenants' families were part of the business arrangement.

⁴⁷ The real difficulty in *Coons' Case* is that it falls within the safety-deposit arrangements I have discussed elsewhere, where the more plausible view is to deny that the bank has bailment of any such deposit, whether by a hirer or a stranger. See A. Tay, "Bailment and the Deposit for Safe-Keeping" (1964) 6 *Malaya L. Rev.* 229. The bank might, of course, have accepted contractual liability toward the hirer. The Court, approaching the matter in the way it did, seems not to have considered the possibility that the daughter by depositing in the box bailed the articles to her father.

⁴⁸ As *Cave*, J. recognised in *R. v. McDonald supra* at 328.

that there is no liability because the misdelivery was not negligent. The plaintiff himself, as the Court noted, had been imposed upon by the cheat and had made no checks more rigorous than the defendant's,⁴⁹ which might be taken as further support for the view that the defendant's conduct was reasonable in the circumstances⁵⁰ and that the plaintiff was simply attempting to transfer a loss without much reason for doing so.

Wechsler v. Picard Importing Co., reappraised, becomes somewhat more difficult. Clearly, there is acceptance of possession amounting to bailment; the question is, by whom? On the facts, it would seem that the acceptance is either by the defendant, with the co-tenants, who have the run of the premises, having implied authority to receive on his behalf,⁵¹ or by the defendant and the co-tenants as joint possessors of the premises into which the article is accepted. On either position, the defendant is liable if the second co-tenant was negligent in redelivering. The defendant would not be liable on a third position: if the first co-tenant had received into his own possession, making himself a bailee for the defendant. The facts of the case, however, do not indicate a separation of spheres of control within the premises that would support this third view. The real difficulty in the case is whether the second co-tenant's action amounted to negligent misdelivery at the low level of care required from the defendant as an involuntary bailee who had not ordered the goods: this is a (borderline) question of fact.

It would be unusual to conduct a discussion of involuntary bailment without mentioning the well-known case of *Hiort v. Bott*.⁵² The custom, nevertheless, is a curious one. The facts showed that the defendant did not actually have possession of the goods alleged to have been converted, and the Court at no stage imputed such possession to him. The situation before the Court was this: G, a former broker for A, had ordered from A a consignment of goods to be sent to B, a reliable purchasing house which had had no previous dealings with G or A. The goods (barley) were forwarded to a railway station to be held till called for and A sent to B an invoice which stated that the barley was "sold by Mr. G as broker between buyer and seller" and a delivery order which made the barley deliverable to "the order of consignor or consignee". G called on B before any further steps had been taken, admitted a mistake and asked B to indorse the delivery order to G so that the expense of obtaining a fresh order might be saved. The order was so indorsed by B, and G used it to possess himself of the goods and absconded. A then sued B in trover for conversion; the lower court directed the jury to find for the defendant but gave the plaintiffs leave to move for a verdict for them, which was granted in the Court of Exchequer. Argument at the Bar

⁴⁹ This point should not be treated as establishing a general principle; the situation confronting the plaintiff may require less care than that confronting the defendant.

⁵⁰ "If I am apprised by another that a certain article belonging to him was sent to me by mistake, am I not justified in assuming, from the very fact of such party first making me aware of its presence, that he is the true owner and entitled to its return? Am I obligated or beholden to the true owner, if I am deceived, to account for the value of the article thus secured from me through trick? I think not" (506, 75 N.Y. Supp. at 1014).

⁵¹ Being in this respect like a lodger or house-guest who opens the door and accepts goods on the occupier's behalf. Such a person, for these purposes, makes himself a "casual servant" receiving into the master's possession, unless there be evidence that he takes into his own control. The learned judge thought that the evidence of some previous acts of mutual accommodation between the co-tenants was not sufficient to establish "an agency", though even if there had been such agency he would not have imposed liability because of the lack of a contractual relation between the parties. But the learned judge was looking for authority given by the defendant-tenant, such as would be required in the law of agency generally. For the purposes of bailment, however, a servant or house-guest may receive into the householder's possession even though he has no authority to do so, merely by opening the door and taking "for" the householder. Such, at least, is the view we are attempting to argue.

⁵² (1874) L.R. 9 Ex. 86.

focused attention on elements of conversion other than the need for bailment. Counsel for the defendant, treating his client as an involuntary bailee, put forward three possible requirements for conversion — intention to convert the chattel to the use of the defendant or some other persons, an act destroying or changing the quality of the chattel, and, most generally, an act “dealing with the property”. On any of these tests his client had not committed conversion: the defendant intended nothing but to return the barley to the plaintiffs and had no thought of dealing with it in any way. Counsel for the plaintiffs insisted that the defendant was not an involuntary bailee, for the barley “was not in his possession, and no act of his was required to give the plaintiffs possession of it”. The defendant by an unnecessary and unauthorised act — that of indorsing the delivery order to G — had deprived the plaintiffs of the goods; this was enough for conversion even if there was no intent.

The Court, in effect, accepted the submission for the plaintiffs, including counsel’s rival description of conversion as the situation “where a man does an unauthorised act which deprives another of his property permanently or for an indefinite time”.⁵³ Cleasby, B. said:

The ground of the decision in the present case is that the defendant had no title whatever to the goods — that there was no necessity whatever for his interfering in any manner in the disposal of them, but that he improperly, though innocently . . . having the indicia of title, by mistake, as he knew, transferred that title to the possession of G. I think a person who deals with the property in this way does so at his peril, and if by means of it a fraud upon the owner is accomplished, he is responsible.⁵⁴ Bramwell, B. similarly held that the defendant’s unauthorised act of indorsing the order “was assuming a control over the disposition of (the) goods, and a causing them to be delivered to a person who deprived the plaintiffs of them”.⁵⁵ This was sufficient for conversion.

The Court, then, did not hold that the defendant was liable *as an involuntary bailee*, and in not holding that it did not imply that he was a voluntary one.⁵⁶ The examples of conversion cited by Court and counsel, it is true, were all examples where the converter had possession, but no weight whatever was put on this fact and the Court’s judgment was generally remarkable for the way in which it managed not to raise the issue of possession at all. Bramwell, B.’s reference to assuming a control over the disposition of the goods and subsequently causing them to be misdelivered suggests a certain parallel to conversion by a bailee, but it is no more than a parallel. The learned Baron indeed went on to lament that the word “conversion” appeared in the proceedings and said that the mere facts of the case, if set out in a non-artificial system of pleading, would represent a precise and logical statement of a tortious act causing loss to the plaintiffs.

Hiort v. Bott, then, is not a case of bailment. On the contrary, it represents

⁵³ *Per* Bramwell, B. at 89.

⁵⁴ At 92.

⁵⁵ At 89.

⁵⁶ The comment by Edward H. Warren in his *Trover and Conversion: An Essay* (Cambridge, Mass., 1936) 80—“Note that in this case the possession was not thrust upon the defendant. He voluntarily assumed control”—is grossly misleading. The Court did not treat the assumption of control over the disposition of the goods as being an assumption of control of the goods. It is true that the liability of the defendant was treated implicitly as being like the voluntary bailee’s liability for conversion (*Hollins v. Fowler* (1875) L.R. 7 H.L. 757) and not as being like that of the involuntary bailee liable for negligent conversion only (*Elwin & Powell v. Plummer Roddis & Co.* (1933) 50 T.L.R. 158). At least this is so if we take the Court’s references to the “improper and unreasonable” nature of the defendant’s act as not amounting to the finding that he was negligent. But again, there would be no more than a *parallel*. It is not any bailment, but the act of indorsing, which the Court treats as voluntary, that is, as not taking place under the pressure of necessity.

a realistic and surprisingly non-traditional attempt by the Court to grapple with the commercial arrangements that have made control over the disposition of a chattel independent of control over the chattel itself. Rights to possess have become capable of assuming independent existence and of becoming the subject of independent transactions in the form of paper indicia of title. Conversion can thus become, as it did in *Hiort v. Bott* an offence against title that no longer requires possession of the chattel in question.⁵⁷

* * *

The primary duty of the bailee, we have argued, arises from his entering into a relationship with a chattel; it requires neither an agreement with, nor any knowledge of the person of, a particular bailor. It is not accurate to say, however, as Williston said, that the rightful possession of goods by one who is not the owner always amounts to bailment, unless Williston is assuming the debateable proposition that a person cannot have possession of a chattel unless he has expressly or by clear implication accepted control of the chattel. If a man loses a ring in my car, I have rightful possession of it as possessor of the car even though I do not know the ring is there. My possession is sufficient to sustain larceny or trespass against any one who takes it without my leave. It is also sufficient to defeat the claim of a would-be finder. But until I am made aware that the ring is in my car, I have no duties towards its owner and, therefore, am not a bailee. To become one I must in some way consent to having possession, though in some situations the law may give me little leave to reject it.⁵⁸ The consent required is not that of the bailor but that of the bailee; the point of the bailment implied by necessity is not that necessity forces the bailor to deliver, but that the bailee's knowledge of the necessity is evidence of his consent to the chattel being bailed to him. In *Ridgley Operating Co. v. White*⁵⁹ the plaintiff rented an apartment in the defendant's apartment-house on a long-term basis which made the relationship that of landlord and tenant, and not of innkeeper and guest. The plaintiff's movers deposited a trunk and other effects in the hallway outside her apartment and the trunk disappeared. The plaintiff brought suit, alleging a delivery to the defendant, and was awarded judgment in the court of first instance and on appeal. The Court of Appeal held that while the landlord had no actual knowledge of the existence of the trunk, his acceptance of bailment could be implied from his general knowledge that tenants left their effects in the hall and from his knowledge of the necessity of their doing so before bringing them into the rooms. Acceptance has similarly been implied from the invitation to trade at a place of business and the accompanying necessity of laying down certain articles while doing so.⁶⁰ On the other hand, the courts will not imply acceptance of articles that are unusual or hardly

⁵⁷ This was recognised in *Oakley v. Lyster* (1931) 1 K.B. 148: "There may be a conversion of goods even though the defendant has never been in physical possession of them, if his act amounts to an absolute denial and repudiation of the plaintiff's right." In that case, the defendant in fact had possession.

⁵⁸ A man cannot without his consent be made to incur the responsibilities toward the real owner which arise even from the simple possession of a chattel without further title and if the chattel has without his knowledge been placed in his custody his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it:

Per Cave, J. R. v. Ashwell (1886) 16 Q.B.D. 190 at 201. The truth of these words should be limited—as it was not in the case—to rights and liabilities under bailment. Concerning rejection, a man may without wrong expel a stray horse grazing on his land when he becomes aware of it, but he may not throw a valuable ring out of his car on to the roadway. The principle appears to be that he should not unreasonably expose the chattel to greater jeopardy than already present.

⁵⁹ (1933) 155 So. 693 (Ala.).

⁶⁰ *Feder v. Franklin Simmon & Co.* (1916) 157 N.Y. Supp. 895; *Woodruff v. Painter* (1892) 150 Pa. 91, 24 Atl. 621; *Delmour v. Forsythe* (1911) 128 N.Y. Supp. 649; *Webster v. Lane* (1925) 125 Misc. Rep. 868, 212 N.Y. Supp. 298.

contemplated in the circumstances. Thus, in *Hunter v. Reeds Sons*⁶¹ the Court held that a customer who left 41 dollars and a diamond ring in his clothes in the dressing-room of a clothing store could recover for the money but not for the ring, since the proprietors' implied acceptance of custody should be taken to extend only to things usually carried in their pockets by prudent people.⁶²

In certain other cases (articles put down in shops, restaurants, etc.) the passing of possession as well as consent may be in question. Where an invitation to put down or hang up is not clear, some evidence that actual control has passed will be required. In *Ultzen v. Nicols*⁶³ the plaintiff sought damages from a restaurateur in respect of a stolen coat which a waiter took from the plaintiff without being asked and hung on a hook. Charles, J., upholding the decision in the lower court that there was bailment and liability, emphasised that the waiter took and disposed of the coat where he chose and that his action was in the interest of the restaurateur.⁶⁴ In *Wentworth v. Riggs*,⁶⁵ where a guest at a restaurant hung his overcoat on a hook provided for the purpose a few feet from his table, and in *Theobald v. Satterthwaite*,⁶⁶ where the customer of a beauty salon hung her coat in an unattended waiting-room, the courts held there was no bailment.⁶⁷

Bailment and the duties of the bailee, we have argued, arise from the bailee's entrance into a relation to a thing, and not, in the first instance, from his relation to a bailor. But for bailment, entering into the relation to a thing must be a self-conscious activity like intending or controlling. As with the two latter, law views such entrance or acceptance objectively: the knowledge and consent required will be implied from the situation even where there is evidence that there was no subjective knowledge or consent. Once that knowledgeable consent has been given and the relationship of bailment entered into, the consent cannot be carelessly withdrawn on the pretence of repudiating the bailment.⁶⁸

⁶¹ (1899) 12 Pa. Super. 112. The view was taken in *Michigan Central R.R. v. Carrow* (1874) 73 Ill. 348, 24 Am. Rep. 248; *Bunnell v. Stern* (1890) 122 N.Y. 539, 25 N.E. 910; *Sawyer v. Old Lowell National Bank* (1918) 230 Mass. 342, 119 N.E. 825; *Waters v. Bean Site Co.* (1920) 114 Misc. 65, 186 N.Y. Supp. 731 (City Ct.); *Riggs v. Bank of Camas Prairie* (1921) 34 Idaho 176, 200 Pac. 118.

⁶² *Barnes v. Stern Bros.* (1915) 89 Misc. 385, 151 N.Y. Supp. 888 (Supr. Ct. 1915) where the Court held that proprietors accepted custody only of customers' clothing necessarily laid aside. In *Samples v. Geary* (1927) 292 S.W. 166 (Mo.) the Court of Appeal held that the operator of a checking counter had not accepted a fur piece wrapped in a coat and completely hidden when the coat was presented for cloaking because he did not know of its existence. The courts here and elsewhere may have been influenced by the difficulty of checking claims rather than by any implausibility in implying consent to accept: in *Palotto v. Hanna Parking Garage Co.* (1946) 68 N.E. (2d) 70 (Ohio), the Court allowed the plaintiff's claim for damages for his car stolen from the garage and for those articles that he informed an attendant were being left in the car; it disallowed his claim for articles he had failed to mention.

⁶³ (1894) 1 Q.B. 92.

⁶⁴ The same line has been followed in a large number of American cases, brought together in 1 A.L.R. (2d) 803f.

⁶⁵ (1913) 159 App. Div. 899, 145 N.Y. Supp. 955, 5 N.C.C.A. 848.

⁶⁶ (1948) 190 P. (2d) 714 (Wash.), 1 A.L.R. (2d) 799.

⁶⁷ American courts, however, have been willing to entertain claims for negligence where there is no bailment but evidence of deficiency in the general supervision of the premises and of customers' belongings upon them, on what appears to be an analogy with an occupier's duty of care.

⁶⁸ In *Ryan v. Chown* (1910) 160 Mich. 204, 125 N.W. 46, the finder of turkeys took them into her possession without knowing the owner, but on learning his identity released the turkeys on to the highway at night without notifying the owner. The turkeys were lost and the Court held her liable for conversion.