Cornell Law Review

Volume 16
Issue 3 *April 1931*

Article 2

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PRINCIPLES OF BAILMENT

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It has been both affirmed and denied that hard cases make bad law. It will perhaps be admitted that hard cases make difficult yet fascinating law. As they often contain novel questions, they frequently make new law, not only because the case itself is new, but also because the case opens a new channel which may be enlarged by later decisions. Probably no other reason is needed to justify the examination of cases which might otherwise be considered unimportant.

In making such an examination, it must be kept in mind that defining and classifying is not an end in itself. It is a way to better understanding by which the rights and duties of persons can be determined with an ease and accuracy otherwise unattainable. It is a matter of convenience and utility if made correctly and with regard for all the facts; it is positively harmful if not so made. It will not do to force the facts of a new case into a classification made from former cases. If the case does not naturally fit into the classification, the classification is wrong and should be altered. Moreover, even a classification which holds nearly all the cases is unsatisfactory if there are still some that will not fit into it.

In the field of bailments the common and usual cases have controlled the terminology and classification to such an extent that the less usual cases have with difficulty retained their standing as cases of bailment. It has been said that "to adjust the definition to a minor group of transactions, the finding of lost goods and the deposit by natural forces on another's property, is to classify a large group by the characteristics of a few of its members . . . ."[1] The endeavor should be to find the element common to all members of the large group and to disclose the trunk upon which perhaps several varieties are borne.

It is proposed in this paper that some of the statements frequently made about bailment be examined in the light of decided cases with a view to the discovery of the true elements of bailment; further, that the position of the unusual cases of bailment be considered, and that an attempt be made to discover something about the creation and extent of the duty of the bailee.

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[1]Cullen, *The Definition of a Bailment* (1926) 11 ST. LOUIS L. REV. 257, 264.

I

The antithesis of terminology and decision.

A. Although it is frequently said that bailment is founded upon contract, the actual decisions show that it is not so founded.

Although a bailment usually is created by a contract, it is not necessarily always so created;[2] nor, indeed, is even mutual consent to the relationship a requisite. Finding and taking into possession was early treated as a case of bailment,[3] yet there is no true consent to anything on the part of the loser. His consent and request could be supplied only by the baldest sort of a fiction.[4] The courts of the nineteenth century, obsessed by the idea of contract, frequently required that there be a contract where none should have been required. Usually they did not scruple to "imply" promises from nothing whatever in order to meet their own excessive requirement. The broad ground was that "the law always implies an agreement to do what a man's legal duty requires him to do."[5] In this way even an instance of finding could be treated as a case of contract. The fact remained that it was not a case of contract, but was merely being treated as if it were.

Sometimes, however, the courts, after having needlessly created the requirement that there be a contract to found the bailment upon, were unkind enough not to "imply" the contract. At best the promise was a fiction which could have been avoided, and a fiction, even if it is supposed to be understood to be nothing more than a fiction, is an unnecessary obstacle to those who teach and those who learn. Sir W. S. Gilbert made Tomasso say, "It is a legal fiction, and a legal fiction is a solemn thing."[6] He might have added that courts were solemn things, too; sometimes so solemn that, like the tellers of all good stories, they come to believe their own fictions. In this possibility lurks grave danger.

Cases are numerous in which the lack of a contract is alleged as a ground for deciding that no bailment existed. Some of them have been decided since the relation of the doctrine of undertaking to bailment was explained by Joseph H. Beale, jr., forty years ago.[7] Yet the persistence of the false notion that there can not be a bailment

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[2]Costello v. Ten Eyck, 86 Mich. 348, 49 N. W. 152 (1891); Foulke v. N. Y. Consolidated R. R., 228 N. Y. 269, 127 N. E. 237 (1920); Armstrong v. Sisti, 242 N. Y. 440, 152 N. E. 254 (1926).

[3]Armory v. Delamirie, 1 Strange 505 (1722).

[4]See Beale, *Gratuitous Undertakings* (1891) 5 HARV. L. REV. 222, 224.

[5]Smith v. Nashua & Lowell R. R., 27 N. H. 86, 97 (1853).

[6]GILBERT, THE GONDOLIERS, Act II. [7]Beale, *op. cit. supra* note 4.

without a contract may be a sufficient reason for recurring to that topic. The truth is that the decisions in nearly all the cases which are placed upon the ground that there was no contract, can be supported upon other grounds which have often, but not always, been recognized in the opinions.

For instance, in *Bertig v. Norman*[8] the plaintiff tried to show that the defendant had become the bailee of cotton belonging to the plaintiff so that he was responsible for its disappearance. The cotton at one time stood, with plaintiff's consent, upon a public platform. The defendant certainly did not then have possession of it. Later the defendant marked it so as to show its weight, and did other things which might have been relied upon as constituting a taking of possession had it not also appeared that the acts were in accord with local customs of trade and did not indicate any intent on the part of the defendant to take possession or to exclude others from possession. The vital requirement of possession by the bailee was lacking, therefore, so there was no bailment. The court, however, defeated the plaintiff because it found no "contract."

In *Bohannon v. Springfield*[9] it was not shown that the alleged bailee knew that he had the goods of another in his possession, so it is reasonable to suppose that he owed no one a duty in respect to the goods. As to this point, more will be said later. Furthermore, if the alleged bailee had owed a duty, it would not have been owed as a bailee, for he was a servant and had no possession because possession was in his master.[10]

In *Cowen v. Pressprich*[11] it was said, as in the other cases now being discussed, that there was no bailment because there was no contract. If it had been held that there was a bailment, the result in the defendant's favor would have been the same for he had done all that the law required a bailee to do under the circumstances, as will appear hereafter.

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[8]101 Ark. 75, 141 S. W. 201 (1911).

[9]9 Ala. 789 (1846).

[10]A. T. L. R. R. v. Baker, 118 Ga. 809, 45 S. E. 673 (1903); Tuthill v. Wheeler, 6 Barb. 362 (N. Y. 1849); DOBIE, BAILMENTS & CARRIERS (1914) § 10. Accordingly in Moore & Co. v. State of Maryland, 47 Md. 467 (1877), in which the plaintiff sought to hold the state as a bailee, it was decided that the public official was not a mere servant so that the state did not have possession through its servant and was not a bailee. The official, not being a servant, was himself the bailee.

[11]202 App. Div. 796, 196 N. Y. Supp. 921 (1st Dept. 1922), reversing the judgment below on the dissenting opinion of Lehman, J., 117 Misc. 663, 676, 192 N. Y. Supp. 242, 249 (Sup. Ct. 1922).

In *Wechser v. Pickard Importing Co.*[12] the alleged bailee, with two co-tenants, occupied a room. In his absence, one of his co-tenants received the goods which a swindler had induced the plaintiff to send to the room in his name. Later the other co-tenant permitted the swindler to take the goods away. Those are all the facts which the report shows were relied upon to prove that the defendant had possession. They seem insufficient. But if he did have possession and was a bailee, the result would have been the same, for here also the defendant had used all the care required by law in making delivery in a bailment of that type.

These cases were properly decided and would have been so decided regardless of the court's expression in each that there was no bailment because there was no contract. Consequently they do not prove that the law is as they say it is. Perhaps they do not even show that there is widespread misapprehension as to what the law is; but rather that there is an unfortunate inaccuracy in the terminology in common use, a terminology formed for use on the normal bailment created by contract or at least by agreement and mutual consent, and which is inadequate and misleading when applied to unusual cases. For instance, when it is said that a bailee is liable for a misdelivery regardless of the amount of care he has used, the statement is accurate if applied to the ordinary bailment. But when it is used to assist in deciding a case such as *Wechser v. Pickard Importing Co.*[13] it drives the court either to saying that there was no bailment, when in truth there was one, or to an erroneous decision, for the rule of strict liability has no application to such a case. It must be said, however, that generally the courts have chosen the alternative which led to confusion rather than the one which led to injustice.

In at least one case, however, it appears that the vain but unnecessary search for a contract did lead to a wrong result. In *Coons v. First National Bank of Philmont*[14] action was brought to recover for damage alleged to have been suffered through the negligence of the defendant in caring for certain securities which the plaintiff had deposited in a bank's safe deposit box, whence they were stolen by burglars. The actual plaintiff had no contract with the bank; the box had been hired by her father. The court said, "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 surroundings and attend-

[12] 94 Misc. 157, 157 N. Y. Supp. 803 (Sup. Ct. 1916). [13] *Supra* note 12.
[14] 218 App. Div. 283, 218 N. Y. Supp. 189 (3d Dept. 1926).

ant circumstances; but always liability is grounded in contract; one cannot be made the bailee of another's property without his consent. . . . 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."[15]

Thus the court not only says that there can be no bailment without the mutual consent of the parties, but it confuses mutual consent or mere agreement with true contract or a promise to act in the future. But the principle that "one cannot be made the bailee of another's property without his consent" does not require that there be a contract, or even that there be a mutual agreement. It means nothing more than that a person should not have obligations thrust upon him without reason and ought not to be required to use care toward property when he did not know that he was possessed of it. The first part of this rule has a parallel in the contract rule that a person can not ordinarily be subjected to the duty of actively rejecting an offer in order to escape the obligations flowing from the acceptance of it. The second part restates the general principle that a person should not be expected to use care toward a person or thing which he did not know was in a particular place when he acted. The landowner's lack of duty to an unsuspected trespasser is a familiar illustration. In bailments, the whole principle may be stated to be that one is not subject to any duty of care toward another's property thrust on him unless he knows that he has it,[16] and he does not even then have the obligations of an ordinary bailee toward it unless he consents to its being in his possession.

In the *Coons* case it could scarcely be denied that the bank had knowledge of the presence of valuables in the box and had consented to their being there. It may not have known who owned the securities, but there are many cases where identity of the owner is not material, and no intent to hold for a particular person is necessary. In the case of a finding the bailee holds for an unknown bailor, yet a finder is not free from duty to care for the article if he takes it into his possession. Where a person sent money to a bank to be deposited to his credit and the bank refused so to deposit it, but claimed to hold it for another person, it was held that the bank, in spite of its intent to hold for another, became a bailee of the sender of the money.[17] It is unbelievable that a bank is under no duty to use care or is permitted

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[15]*Ibid.*

[16]Krumsky v. Loeser, 37 Misc. 504, 75 N. Y. Supp. 1012 (Sup. Ct. 1902); Lethbridge v. Phillips, 2 Starkie 478 (1819); Consetino v. Dominion Express Co., 16 Manitoba L. R. 563 (1906).

[17]Davidson v. Alaska Banking Co., 5 Alaska 683 (1917).

to use less care than would otherwise be required because it was mistaken as to the identity of the bailor. It is submitted that in *Coons v. First National Bank of Philmont*[18] the court acted under the erroneous principle that bailment arises from contract or, at least, agreement.[19] But the case may be defended on the ground that the bailee possibly had not consented to receive into its possession the property of anyone other than that of the other party to the contract (although that it seems that such contracts are not usually so restricted), and one can not have the duties of an ordinary bailee thrust upon him without his consent. As will be pointed out later, that does not mean that there is no duty whatever, but means merely that the duty to use care is an extremely slight duty. If the bailee had been informed that the property of others was to be put in the box and had not dissented, the assent to receive possession would have made the bailee liable to use the same care toward the daughter's property as it should have used toward the father's.

Various things help to explain the origin of the false notion that a bailment was always created by contract, leading frequently to a vain but unnecessary search for consideration. "But the true reason for all this talk about consideration for a gratuitous bailment seems to be forgetfulness of the fact that assumpsit was in origin an action of tort, and will sometimes lie for one. Assumpsit having become so intimately bound up with contract, it was perhaps only natural that consideration should always be sought where that action was used, and this accounts for some of the very forced definitions of the word. But to do so was wrong; where assumpsit is delictual no consideration need be alleged, and we know that actions on bailments sound in tort. . . .[20] Cases in which consideration for a gratuitous bailment has been found are really cases of negligence, cases of delictual liability disguised by the form of action."[21]

B. Delivery of only part of what was contracted to be delivered does not prevent a bailment of the part delivered.

Voland v. Reed[22] has been found carelessly cited as holding that when the essential parts were missing there was no delivery of a

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[18]*Supra* note 14.

[19]Although deposits in safe deposit boxes differ in some important respects from bailments, the question in the case discussed can be treated as one of bailment. (1925) 10 CORNELL LAW QUARTERLY 255; (1927) 11 MINN. L. REV. 440.

[20]The learned author of the quotation cited here "Bryant v. Herbert, (1878) 3 C. P. D. 339 and Turner v. Stallibras, (1898) 1 Q. B. 56."

[21]Davidge, *Bailment* (1925) 41 L. Q. REV. 433, 439.

[22]164 N. Y. Supp. 19 (Sup. Ct. 1917).

machine so that no bailment was created. In truth no question of bailment was raised in the case. The holding was that the delivery did not comply with the terms of the contract, which is quite a different thing. Certainly there was a bailment of a machine actually delivered. Probably the defect in delivery according to the terms of the contract prevented the creation of the kind of bailment contemplated, but that is not the same as saying that there was no bailment whatever.

C. A bailment may exist so that some of its ordinary consequences follow although others do not.

Just as a sale or chattel mortgage may be binding between the parties to the contract, although ineffective as to some third persons, so a bailment may exist between the bailor and bailee although it may not be a bailment as to third persons. Thus, in *In re Shiffert*[23] an automobile was delivered to a man who later became bankrupt. A somewhat heterogeneous written agreement purported to create a trust and a bailment as well as a conditional sale. Apparently the instrument was not filed, so it did not affect certain third persons. As to them the title passed to the purchaser, so that title and possession were in the same person and there was no bailment. As to persons who were affected by the agreement, including the parties to it, the title did not pass, so possession was in one and title in the other, and there was a bailment. The statement in the opinion in that case that the agreement lacked the elements of a bailment must be understood in connection with the question before the court, namely, when the purchaser became bankrupt, was his trustee or the seller entitled to the automobile? Had it been a bailment as to third persons or creditors, the seller would have been entitled to it. Since it was a sale as to third persons and creditors, they were entitled to part of the assets of the deliveree treating him as owner.

D. A bailment is not necessarily terminated by the expiration of the contract of bailment.

It is often said that a bailment terminates upon the fulfilment of the purpose of the bailment, the expiration of the agreed time, and so forth. These statements, although literally true, may be misleading if unexplained. When the contract of bailment expires, the bailor may expressly or impliedly consent to the bailee's still keeping the chattel. Little evidence is required to show this. If the bailor does consent, the bailment may continue as before, or may change from one kind of a bailment to another. Then, depending upon the facts, the rights and duties of the parties may be altered, but the bailment

[23]281 Fed. 284 (E. D. Pa. 1922).

continues.[24] If, however, the bailor does not consent to the extended possession, the bailment does come to an end. When the bailee holds beyond the contract period, possession becomes wrongful and the obligation becomes "absolute liability." Such a relation can scarcely be called a bailment.

II

A Consideration of Cases upon the Border of the Field of Bailments.

A recent case, *Foulke v. New York Consolidated R. R.*,[25] says, "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."[25a]

Lawful possession of the property of another is generally admitted to be one of the requisites of a bailment. This is commonly expressed by saying that a bailment requires a delivery. This accurately expresses what takes place in the usual cases of bailment; but is not sufficiently inclusive to describe what occurs in some of the less usual cases, such as the taking into possession by a finder. The expression "lawful possession," as conveying the idea of no action by the owner, is preferable to "delivery" because less misleading. Where a vendor sells but keeps possession for the vendee, even the bailee does nothing active in establishing possession.

But are there other requisites of bailment? If so, what are they? And if other circumstances do concur, what is their effect? It is proposed that the principal cases which fringe the lower border of bailments be examined with these questions in mind.

A. Possession of property taken voluntarily and rightfully, yet without the consent of the owner.

If a person voluntarily and rightfully takes the goods of another, yet without the consent of the owner, the voluntary assumption of possession creates duties on the part of the possessor, making him subject to the duties of an ordinary gratuitous bailee in caring for the property. The typical case is that of the finder of lost property.[26] There is some authority that the bailee is entitled to be reimbursed

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[24]Edgar v. Parsell, 184 Mich. 522, 151 N. W. 714 (1915); Young v. Leary, 135 N. Y. 569, 32 N. E. 607 (1892).

[25]*Supra* note 2.

[25a]*Ibid.* 275, 127 N. E. at 239.

[26]Joy v. Crawford, 154 S. W. 357 (Tex. Civ. App. 1913); Isaack v. Clark, 2 Bulstr. 306 (1615).

for his expenses in caring for the property thus taken into possession, partly because of the analogy to maritime salvage.[27] So far as concerns the measure of the finder's duty as a custodian it is true that the receipt of a benefit by a bailee takes the bailment out of the class of gratuitous bailments and subjects the bailee to a duty to use greater care than is required of a gratuitous bailee, no matter how small or uncertain the benefit is,[28] but in the case of the finder that principle has no application. For at most his right is the recovery of expenses incurred and does not extend to compensation for protection rendered. He receives no benefit, is merely reimbursed for loss, and thus remains a gratuitous bailee.

Where the finder did not know who the owner was, it has been held that the bailee was not absolutely liable for a misdelivery, as in an ordinary bailment, but was merely required to use reasonable care under the circumstances.[29] It would not be reasonable to require more.

Wilson v. McLaughlin[30] is an odd case. The defendant, a servant of Bolles, found a horse straying on the highway near an avenue which led from the travelled road into the messuage of Bolles. The defendant drove the horse from the highway into an inclosed pasture of Bolles in order to prevent it from straying upon his master's cultivated land. Bolles, upon learning a day or two later what had been done, directed the defendant to turn the horse into the highway again. The defendant obeyed and the horse was never recovered by the owner. The court said that the plaintiff, the owner, was not complaining in his action of the defendant's taking the horse from the highway into the pasture, but was complaining that he "afterwards violated his trust as a voluntary bailee by returning the horse into the highway again. But this, it appears to us, was the act of his employer and not of himself. He could not keep the horse on another man's land, against the will of such other man. The turning out into the highway was therefore an act which he could not prevent, and for which he cannot be held responsible . . . ."[31]

Perhaps the better explanation of the case is that the servant did not intend to take the horse into his own possession, but intended to

[27]Reeder v. Anderson's Administrator, 4 Dana 193 (Ky. 1836); Chase v. Corcoran, 106 Mass. 386 (1871); Amory v. Flyn, 10 Johns. 102 (N. Y. 1813). See also Nicholson v. Chapman, 2 H. Bl. 254 (1793). *Contra:* Watts v. Ward, 1 Ore. 86 (1854).

[28]Newhall v. Paige, 10 Gray 366 (Mass. 1858); Woodruff v. Painter, 150 Pa. St. 91, 24 Atl. 621 (1892).

[29]Morris v. Third Ave. R. R., 1 Daly 202 (N. Y. 1862).

[30]107 Mass. 587 (1871). [31]*Ibid.* 590.

take possession for his master. As he had no authority to do so, and as his master refused to ratify his act, no one took possession in the legal sense. It is obvious that the master did not. The servant never intended to take possession for himself nor to exclude others from possession. The case may be understood to show that mere control is not enough to create a bailment. There must be possession in the strict legal sense of the word.

If there had actually been a bailment, the bailee could not have so easily divested himself of possession with impunity. In *Ryan v. Chown*[32] the finder of turkeys took them into her possession but later, at night, without notifying the owner, whose identity had been discovered, returned them to the place in the highway where they had been found. It was held that the releasing of the turkeys was under the circumstances a conversion.

B. Possession without the fault of the bailee after the prior contract of bailment had expired.

This class of cases is illustrated by *Smith v. Nashua & Lowell R. R.*[33] Hides had been shipped over the defendant railroad to Smith, who unloaded them but did not remove them. The agent of the railroad repeatedly requested Smith to take them away and some were accordingly removed. Others remaining were injured by water leaking into one of the sheds where the agent of the railroad had placed them. Smith recovered in an action against the railroad based on negligence. On appeal the judgment was affirmed. The court, after speaking of the cases of finding, said, "A much more numerous and frequent class of cases, where the law imposes the duty of a depositary without any actual contract for that purpose, is where the property of one person is voluntarily received by another, by delivery of the owner, for some different purpose than that of keeping it, and upon an express or implied agreement of a different kind, which has been answered or performed, and the property remains in the hands of such party without further agreement. In such cases the law, having regard to the requirements of justice between men, implies a contract for the keeping of the property, until it shall be restored to the proprietor, or his agent; and the contract thus implied is ordinarily that of a depositary. The holder is bound to take care of, keep and preserve the property, not for the sake of any benefit to himself, nor upon any expectation of compensation for his services; but solely for the convenience and accommodation of the owner."[34]

The court added that if there were a right to receive compensation

[32] 160 Mich. 204, 125 N. W. 46 (1910).
[33] *Supra* note 5. [34] *Ibid.* 91.

ordinary care would be required.[35] After saying that a finder could avoid all the duties of a bailee by refraining from taking the found article into his possession, and that he on whose premises the chattel of another has been casually left might leave it undisturbed or might move it to a convenient distance and there leave it in a suitable place for the use of the owner, the opinion continued, "But the party into whose hands the property of another has come, by virtue of a contract for some other purpose, cannot, when that purpose is accomplished, either leave it where it happens to be, or lay it by and neglect it, unless that may be fairly inferred from the nature of the contract to be the intention and understanding of the parties; but he still continues to owe a duty to the owner, remains liable for the care and custody of the property, until he has delivered it to the owner, or to his agent, or has placed it in such a situation as may fairly be regarded as equivalent to a delivery to him."[36]

Although the cases in which an originally voluntary bailee becomes an unwilling one by the accomplishment of the purpose of the bailment are frequently cases of carriers, there are instances in which the bailee was not a carrier. They are governed by the same principles. In such cases, in order to determine what care should be given the goods under the circumstances, it is important to note that the bailee is in some cases entitled to compensation for storing the goods.[37] Doubtless he would be absolutely liable for misdelivery, for he assumed that liability when he voluntarily received the goods from the bailor and there seems to be no sufficient reason for relieving him from it.

Incidentally, one wonders if the extent of the undertaking as the test of proper care[38] can be applied where possession is left over without any new act upon the part of the bailee. If not, it seems that such a case can be explained satisfactorily only by the theory that the duty arises from the present relationship of the parties, created partly by their prior acts and partly by the failure of the bailor to remove his property from the possession of the bailee.[39]

C. Possession transferred by natural forces without fault of the owner.

In *Foster v. Juniata Bridge Co.*[40] the span of a bridge was deposited

[35]A carrier acting as warehouseman under such circumstances does have a right to compensation. DOBIE, *op. cit. supra* note 10, at §147

[36]*Supra* note 5, at 92. [37]*Supra* note 35.

[38]Beale, *loc. cit. supra* note 4. "It is clear that there is really no contract in the case, at least, of a gratuitous bailment, but that the rights and liabilities of the parties are regulated merely by the bailee's undertaking to hold the property."

[39]See, *e.g.*, POUND, THE SPIRIT OF THE COMMON LAW (1921) 20 *et seq.*

[40]16 Pa. St. 393 (1851).

upon a man's land without any fault of the bridge owner. It did great damage by turning the current so that soil was washed away from the roots of fruit trees. The landowner made use of parts of the span in certain of his buildings. This use was held to be conversion although the parts were not so used until after the owner of the span had refused to comply with a demand for its removal. There was a *dictum* that after notice to the owner of the span the landowner could have cast the span back into the water.

In *Peaslee v. Wadleight*[41] it was held that the owner of land had the right to remove from it lumber which was wrongfully upon it, but it does not appear whether the lumber came there by the fault of its owner or otherwise.

It is believed that where chattels are cast upon land the owner of the land has the possession of the chattel upon it so that he is a bailee, for a person in possession of land is taken to have possession of all that is in or upon it. As long as he is ignorant of the presence of the chattel, doubtless he owes no duty of care toward it. When he does discover the presence of the chattel, probably he is under a duty to use some care toward it, and whether or not he undertakes to keep or care for the chattel should have great weight in determining whether or not he has used proper care under the circumstances. It is not the possession alone that determines the extent of the duty. Whether or not the receipt of possession is voluntary is important. Even if possession has been received involuntarily, the bailee may increase the care he must use by exercising control over the chattel.

D. Possession obtained by taking possession rightfully of the place where the goods are.

Similar to the last class of cases, there is another in which the owner of goods has them in a certain place and, because of his failure to take them away, they subsequently come into the possession of another. Where ties were left upon a right of way which reverted to the original owners of the land, it was held that the owners of the land were bound to deliver the ties to their owners upon demand.[42] The vendee of a house becomes the bailee of goods left therein by a tenant, must use care toward them, and has the burden of explaining their loss.[43] The purchaser of a store in which goods have been left by the former owner has the right to be compensated for storage and

[41] 5 N. H. 317 (1831).

[42] T. J. Moss Tie Co. v. Kreilich, 80 Mo. App. 304 (1899).

[43] Murphy v. Schwark, 117 Wash. 461, 201 Pac. 757 (1921). See also Ascherman v. Best, 45 Wis. 262 (1878).

may by contract have a lien therefor.[44] Even where no lien is created, the right to compensation is admitted.[45]

E. Possession by the owner's inadvertently leaving the chattel in the bailee's possession without the existence of a previous bailment.

Where a passenger inadvertently left a package upon the seat of a railroad car, it was held that it had come into "the custody and the potential actual possession of the defendant. It was the right of the defendant and its duty to become as to it and its owner a gratuitous bailee. It was its right and duty to possess and use the care of a gratuitous bailee for the safe-keeping of the package until the owner called for it."[46] There was no bailment in this case before the passenger left the car, for he had retained possession until that moment.

F. Possession obtained by mistake, as by the fraud of a third person.

In another class of cases a person has been induced by a swindler to transfer the possession of his goods to another person from whom the swindler gets them by fraud. Cases in which the bailee was under the obligations of a common carrier at the time of the misdelivery will not be considered.

In *Heugh v. L. & N. W. Ry.*[47] a bailment to a common carrier was procured by fraud committed upon the shipper by a third person who later induced the railway to deliver the goods to him. At the time of delivery the railway had ceased to be a common carrier of the goods but had become a warehouseman of them. It was held that under the circumstances the bailee was not absolutely liable for the misdelivery. It was said, "Their position has been not inaptly described as that of involuntary bailees; without their own default they found these goods in their hands, under circumstances in which the character of carriers under which they received them had ceased. . . [M]isdelivery under such circumstances is not, as a matter of law, a conversion, but . . . it is a question of fact for the jury, whether the defendants have exercised reasonable and proper care and caution."[48] Attention was also called to the shipper's having made the second fraud possible by having first placed faith in the swindler, a circumstance which would have been unimportant if the railway had been acting as a common carrier at the time of the misdelivery.[49]

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[44]Scheider v. Stone, 111 Mich. 396, 69 N. W. 829 (1897).

[45]Preston v. Neale, 12 Gray 222 (Mass. 1858).

[46]Foulke v. N. Y. Consolidated R. R., *supra* note 2, at 274, 127 N. E. at 239.

[47]L. R. 5 Ex. 51 (1870).

[48]*Ibid.* 57.

[49]Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816 (1896); Price v. Oswego & Syracuse Ry., 50 N. Y. 213 (1872). *But see* Samuel v. Cheney, 135 Mass. 278 (1883).

Difficulty has been experienced in attempting to reconcile this case with *Hiort v. Bott*,[50] decided by the same court only four years later. Induced by the fraud of Grimmett, a broker, the plaintiff made an invoice of grain to the defendant. Grimmett, by representing to the defendant that the transaction was a mistake, induced the defendant to assign the order to him. The defendant acted in good faith, believing that he was correcting the mistake in the way designated by the owner.

Lord Bramwell thought that the person who had come into possession of the chattel of another in such a case would be justified in taking reasonable steps to correct the mistake, for it would be unreasonable to warehouse the chattel or to turn it into the street. He said, "Does he not impliedly authorize you to take reasonable steps in regard to it— that is, to send it back by a trustworthy person? And when you say, 'Go and deliver it to the person who sent it,' are you in any manner converting it to your own use? That may be a question."[51] He seemed to feel that the defendant, although he had acted in good faith, had exercised a dominion over the plaintiff's property which was distinctly not reasonable. He pointed out that the defendant had not sent the order back, but, at Grimmett's request, had indorsed the order to him, which was decidedly dangerous.

Lord Cleasby felt that, as the defendant had received no actual possession of the goods, he had not been placed in a position of difficulty, as in the case of an ordinary involuntary bailment, so that he need not, and consequently should not, have acted at all. It was held that the defendant, by his act, had converted the goods.

In this case the facts were more favorable to the defendant in one respect than in *Heugh v. L. & N. W. Ry.*,[52] for in that case the defendant had voluntarily accepted the goods at one time, although they were later left on his unwilling hands. But in *Hiort v. Bott*[53] the invoice apparently was thrust into the possession of the defendant against his will; the only act he is shown to have committed in respect to it was the act by which he intended to rid himself of the possession of it in the manner supposed to have been requested by the owner.

It is believed that the cases can be reconciled. In both the court seemed to believe that in bailments where the bailee held possession with a reasonable unwillingness he ought not to be held to absolute liability for a misdelivery; that the requirement of reasonable care under the circumstances was strict enough in such cases. In *Heugh v. L. & N. W. Ry.*[54] the jury had found that the defendant had acted

[50] L.R. 9 Ex. 86 (1874).
[51] *Ibid.* 90.
[52] *Supra* note 47.
[53] *Supra* note 50.
[54] *Supra* note 47.

reasonably. In *Hiort v. Bott*[55] the court felt that, as a matter of law, the defendant had acted unreasonably. It is submitted, however, that in *Heugh v. L. & N. W. Ry.*[56] the court was too lenient in applying the rule of reasonable care in delivery to a case in which the bailee was in the beginning a voluntary bailee contracting to deliver.

In *Krumsky v. Loeser*[57] the plaintiff was a manufacturer and the defendant was the proprietor of a large department store. A cheat, representing himself to be the defendant, ordered a large bill of goods from the plaintiff, directing that they be delivered to the defendant's store. The goods were sent by an expressman and were received under a mistaken assumption that they had been ordered. Before the mistake was discovered, the swindler telephoned, represented that he was the plaintiff, said that a package had been delivered to defendant by mistake, and said that a messenger would be sent for it. The goods were delivered by the defendant to the messenger, who presented a forged order, and were heard of no more. The plaintiff sued the defendant, claiming that the defendant was a bailee and was negligent in accepting the goods and in delivering them to a stranger. The court held that there was no bailment for the familiar but erroneous reason that a bailment must be predicated upon some contractual relation, express or implied. But the court did say correctly, "Where one becomes possessed of another's goods by chance or accident, no bailment obligation will arise unless the possessor is aware and has knowledge of the fact that goods have come into his possession which belong to another."[58]

It must be admitted that there could be no bailment obligation upon the defendant before he became aware that he had the property of another in his possession. But when the telephone call was received, the defendant was made aware of his possession of the property of another. The court, after recognizing this, said, "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 possession, that he is the true owner and entitled to its return? Am I obligated or beholden to the real owner, if I have been deceived, to account for the value of the article thus secured from me through trick? I think not."[59] This language is consistent with the view that there was a bailment requiring the defendant to use care in delivering after his discovery that he had possession of the goods of another, which duty he had fulfilled. That the court did not believe that the defendant's duty

[55] *Supra* note 50. [56] *Supra* note 47. [57] *Supra* note 16.
[58] *Ibid.* 505, 75 N. Y. Supp. at 1013. [59] *Ibid.* 506, 75 N. Y. Supp. at 1014.

was the same as that of an ordinary gratuitous bailee is shown in the next sentence of the opinion, "If, however, by any process of reasoning, the duty of a gratuitous bailee could be fastened upon the defendants, then I am of the opinion that, inasmuch as they would only be chargeable in that case with gross negligence . . . they should not be here held liable."[60] In this opinion also it is mentioned that the plaintiff himself was imposed upon by the swindler and the feeling expressed that he was, without much reason, attempting to transfer his own loss to another person.

Wechser v. Pichard Importing Co.[61] has been mentioned above as a case in which it is doubtful that there was any possession by the person claimed to be bailee. If, however, there was such possession, the case falls in the class now being discussed. The opinion contains the statement that " [a] bailment must be predicated upon some contractual relation,"[62] and finds that the defendant was not a bailee. But it also says, "A gratuitous bailee is liable only for gross negligence, and the facts in this case fall short of establishing that."[63]

The cases here considered are similar to each other in several respects. The plaintiff is complaining of a misdelivery; he himself, although not necessarily at fault, had been tricked into making a delivery in very much the same way that the defendant had, so he is not in a strong position when he complains of the defendant's action; the defendant, if he seemed to consent to become a bailee, did so because he was acting under a mistake; and the act he performed in respect to the goods he supposed would correct the mistake of the true owner and would carry out his will. Except in *Hiort v. Bott*[64] the defendant acted reasonably, which is all that ought to be required of him in making delivery. As these cases are all cases of misdelivery, they do not directly show anything about the degree of care which ought to be used towards the goods themselves, but reasonable care under the circumstances would be slight care.

G. Possession transferred by fault of the owner, as by his mistake not induced by a third person.

Cowen v. Pressprich[65] represents a class of cases which differs from those last discussed in that the bailor was not imposed upon and the bailor, if not careless, at least caused his chattel to get into the possession of the supposed bailee. In the case mentioned the action was brought for the conversion of a bond. The plaintiff was to deliver a bond to the defendant under a contract of sale of bonds, but by mis-

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[60] *Ibid.* [61] *Supra* note 12.
[62] *Ibid.* 159, 157 N. Y. Supp. at 805. [63] *Ibid.* 160, 157 N. Y. Supp. at 805.
[64] *Supra* note 50. [65] *Supra* note 11.

take plaintiff's servant was given the wrong bond. He slipped it through a slot intended for such deliveries in defendant's office. The defendant opened an opaque glass window and handed the bond to the young man who was in the small vestibule, supposing him to be the messenger who had brought it, and telling him that a mistake had been made. The young man was not the plaintiff's messenger, and the bond, which was negotiable, was seen no more. The plaintiff obtained a judgment upon the theory that the defendant was a bailee absolutely liable for a misdelivery. This determination was reversed on appeal upon the dissenting opinion in the lower court.

Although that opinion said ". . . they were not subject to any trust or obligation as bailees, for a bailment arises only through an express or implied contract," the next sentence, "They were put in possession of the bond without any agreement on their part, express or implied, to accept the deposit of the bond,"[66] shows that by contract was meant assent to receipt of possession of another's property.

The opinion also said that an involuntary bailee need not put the property out of his possession in order to escape the obligations of an ordinary bailee, but that he might at least take steps to preserve and care for the property without assuming such an obligation; that a person becomes liable as an ordinary bailee only when he exercises some dominion over the chattel, that is, does some act inconsistent with the complete right of dominion of the real owner and which would be wrongful unless the possessor had the right to possession, thus indicating by the act that he *accepts* the possession which had been thrust upon him. In this case the defendant's only act was an attempt to divest himself of possession and did not indicate that he voluntarily accepted the possession which had been thrust upon him. The defendant was not, therefore, liable absolutely for a misdelivery as an ordinary bailee would have been.

It was said, however, "If in making an attempt to return the goods, which was lawful and proper in itself, the defendants used means which were not reasonable and proper, and as a result thereof the goods were lost or misdelivered, the defendants would be liable for negligence or possibly for conversion . . . ."[67] If it is remembered that the plaintiff was suing for conversion committed by misdelivery, it will be seen that the court, although it said an act showing acceptance of possession was necessary to make the possessor absolutely liable for a misdelivery, did not believe that an acceptance was necessary to require the use of care in making delivery.

[66] *Ibid.* 678, 192 N. Y. Supp. at 250.
[67] *Ibid.* 682, 192 N. Y. Supp. at 252.

In *Houghton v. Lynch*[68] goods were delivered to the wrong person by the plaintiff, the master of a ship. The defendant made no attempt to redeliver or to care for the goods. As the possessor did no act indicating that he accepted the possession, it was held that he was under no duty actively to care for the goods.

In *Consentino v. Dominion Express Co.*[69] the plaintiff sent bank notes by mail to his brother. He used an envelope which he had taken from the office of the defendant express company. The letter, because of its insufficient address, was sent to the dead letter office. There the address of the defendant was seen upon the front of the envelope, the address of the plaintiff on the back being unobserved. Consequently the letter was sent by registered mail to the office of the defendant company, where it was received by a clerk and put upon the exposed desk of an officer who was absent from his desk at the time. The letter disappcared. The plaintiff, it was held, was not entitled to recover from the defendant. This result surely is sustainable upon the ground that the defendant supposed the letter was its own and did not know that it had the property of another in its possession. It was pointed out that the plaintiff was at fault in using the defendant's envelope without cancelling the defendant's name and address and thus causing the money to come into the possession of the defendant.

Where, as in these cases, the plaintiff by his own mistake, not induced by a third person, has directly or indirectly caused his goods to get into the possession of another person who never assumed charge of them, the care required toward them would naturally be less than in the cases in which the plaintiff was deceived into parting with his goods. Still some care should be used in keeping or delivering them. Reasonable care under the circumstances would exclude extreme negligence.

H. Possession by action of trespassing animals.

Where animals have trespassed it has been uniformly held that the landowner might drive off the trespassing animals.[70] "It is the nature of those animals which the common law recognizes as the subject of ownership to stray, and when straying to do damage by trampling down and eating crops. At the same time it is usual and easy to restrain them."[71] Caring for them would be a considerable hardship in some cases. The risk of loss by their being turned loose was not so great at

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[68]13 Minn. 85 (1868). [69]*Supra* note 16.

[70]Stevens v. Curtis, 18 Pick. 227 (Mass. 1836); Wilson v. McLaughlin, 107 Mass. 587 (1871); Cory v. Little, 6 N. H. 213 (1833).

[71]O. W. HOLMES, JR., LECTURES ON THE COMMON LAW (1882) 23.

the time the cattle cases were decided as it would be now with automobile traffic. It might be argued that the old rule should no longer be applied in such cases.[72] On the other hand, there is policy in encouraging the owners of animals to keep them confined.

I. Possession by the voluntary act of the owner without mistake.

In this final class of cases the owner of the property voluntarily, knowingly, and without mistake, thrusts the possession of his chattel upon another person who is unwilling to receive possession, and who in some cases indicates his unwillingness.

In *Lethbridge v. Phillips* [73] a person, being desirous to show the defendant a miniature painting belonging to the plaintiff, borrowed the miniature from the plaintiff and delivered it to a son of the defendand who took it to his father's house. The painting was subsequently injured by being left too near a stove. The plaintiff sued in special assumpsit. It was held that the defendant could not be considered a bailee and the plaintiff was nonsuited.

The report of that case is not perfectly satisfactory in several respects. It does not tell whether or not the plaintiff knew what the borrower intended to do with the painting and it does not show whether or not the defendant knew that he had the goods of another in his possession. The first point has to do with the plaintiff's responsibility for the change of possession having taken place. The second bears upon the fundamental requirement of care as a bailment obligation. As has been seen, if the defendant did not know that he had the goods of another in his possession, he was under no duty to use care toward them. Perhaps all that was really decided was that the plaintiff had not made out his alleged case of special assumpsit.

In *Howard v. Harris*[74] the plaintiff, without the consent of the defendant, sent to him the manuscript of a play. It was not returned and could not be found. The report says, "Williams, J., held that there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent."[74a] All that it was necessary to decide was that the plaintiff had not made out a case by proving the defendant's inability to find or return the play, a conclusion which might have been attained by other reasoning. It is not certain that the play ever reached defendant.

[72] "Where the continuance of possession involves no great burden, and the discontinuance of it involves almost certain loss or destruction of the property, it may be doubted whether the bailee would be wholly free from duty" WILLISTON, CONTRACTS (1920) §1039, n. 29.

[73] *Supra* note 16. [74] 1 Cab. & El. 253 (1884). [74a] *Ibid.* 254

In a recent case, *Hope v. Costello*,[75] the plaintiff, having tired of an expensive set of furs which she had bought from the defendant, returned them to the defendant in spite of the defendant's protest. Defendant stored the furs with her own goods for five years, but they were not stored so as to protect them from moths by which they were injured.

The court said, "A constructive bailment arises where the person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation of delivering it to another."[76] Part of the opinion proves that there was no bailment created by contract, but the opinion does not show whether or not the court thought there was any sort of a bailment. It was held that the instructions in the nature of a demurrer requested by the defendant should have been given.

It seems that the facts brought the case within the court's own definition of a constructive bailment, and that the result was really a holding that the bailee had used all the care required under the circumstances. The defendant had refrained from any grossly negligent positive act, and she was not required to take any action to protect the goods.

In *Weinstein v. Modern Silk Co.*[77] there was a similar return of goods to the place of business of the seller, who put the goods in a public hall but later took them into possession. When the purchaser subsequently demanded the goods, some could not be found. It was possible that the loss occurred while the goods were in the hall. In an action by the purchaser against the seller, it was assumed that the defendant's placing the goods off its premises was not an improper act at the time it was done, that is, before the defendant voluntarily took the goods into its possession.

Perhaps other cases belong in this class, although they are farther complicated by questions of agency and of the supposed bailee's ignorance of having possession of the property of another.[78]

In cases such as these, if the bailee does keep the goods, he is entitled to indemnity, as was held in *Leavy v. Kinsella*[79] where the purchaser of pigs returned them while the seller was absent from his home. The court said, "The defendant was placed by the plaintiff's act in such a condition that he was compelled to care for and feed

[75]222 Mo. App. 187, 297 S. W. 100 (1927). [76]*Ibid.*192, 297 S. W. at 103.

[77]170 N. Y. Supp. 529 (Sup. Ct. 1918).

[78]Chesley v. Woods, 147 Ill. App. 588 (1909); Fischman v. Sanitary Toilet Co., 112 Misc. 500, 182 N. Y. Supp. 809 (Sup. Ct. 1920); Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113 (1904).

[79]39 Conn. 50 (1872).

the plaintiff's animals. The defendant is made a bailee, with the duty of incurring expense, not by his own choice, but by compulsion. Upon these circumstances the plaintiff is liable upon an implied assumpsit to pay the expense of keeping."[80] It was also held that there was a lien.

When the owner knowingly, voluntarily, and without excuse forces possession upon another, he has little reason to expect the bailee to be subject to duties in his favor, but that does not prove that there is no bailment. *Lethbridge v. Phillips*,[81] as has been pointed out, is of little value as an authority, even if it really belongs in this class of cases. *Hope v. Costello*[82] does not show that the bailee need use no care whatever, and *Howard v. Harris*,[83] whatever may have been said in it, decided nothing more than that in such a case proof of delivery to the bailee and his failure to return upon demand did not make out a *prima facie* case for the bailor.

It is probable that the owner would succeed, even in such cases, if he showed extreme active negligence on the part of the possessor. It is assumed in all the cases that the owner does not lose title to the chattel. The obligation of the possessor to deliver the chattel to the owner would exist even though the possessor was ignorant that the chattel of another was in his possession. The existence of that obligation ought to be enough to show the existence of a bailment. But it does not follow that all the rules governing ordinary bailments should be applied in such cases.

III

The Creation of the Duty

If there is a bailment whenever there is possession of the chattel of another coupled with some duty, every possessor who is not an owner is a bailee, for every possessor who is not the owner is at least under the duty to surrender the chattel to the owner when a proper demand is made.

It has been seen that no contract is necessary to create a bailment; that the mutual consent of bailor and bailee is not necessary; that an active delivery by the bailor is not necessary, as possession by the bailee without any action on the part of the bailor is sufficient; and that a person who has had goods of another thrust into his possession without his knowledge is under a duty to surrender them to the owner. If bailment begins where possession of another's goods coupled with duty begins, the most extreme form of "involuntary bailment" may properly be termed a bailment.

[80] *Ibid.* at 53. [81] *Supra* note 16. [82] *Supra* note 75. [83] *Supra* note 74.

Thus as stated in *Foulke v. New York Consolidated R. R.*, "It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates a bailment, regardless of whether such possession is based upon contract in the ordinary sense or not."[84] Other things may be present in the normal bailment, but they are not essential to the existence of the bailment. Therefore Williston's definition of a bailment, because of its simplicity, is not only the most convenient but is also the most accurate. "A bailment may be defined as the rightful possession of goods by one who is not the owner."[85]

The circumstances accompanying a bailment affect not only the amount of care to be used toward the chattel, but also other duties of the bailee.

As to care, the bailee's knowledge or ignorance of his possession of a chattel of another is important to an extent perhaps not generally recognized.

What the bailor may reasonably expect of the bailee is important in ordinary bailments. Where the bailor knows or is led to believe that the bailee has certain skill or facilities, a use of them is required of the bailee.[86] Where the bailor knows that the goods are likely to be kept in a certain way which would otherwise be negligent, the bailee's keeping the goods in that way is not negligent because the bailor did not have reason to expect that they would be kept in a better way.[87] These rules are tests of what the bailee undertook. The same principle can be applied to the different classes of involuntary bailments. In them the bailor would not have reason to expect the bailee to use much care or skill, but how much he has reason to expect may differ with the different classes.

It seems that the extent to which the bailor was at fault in creating the involuntary bailment has an important influence upon the amount of care which he, as a reasonable person, could expect the bailee to use. The man whose goods have been washed away and deposited on the land of another without any fault on his part ought to be able to require more care from the bailee than the man who was at fault in letting his goods get away and strand, and much more than the

[84] *Supra* note 2, at 275, 127 N. E. at 239.

[85] WILLISTON, CONTRACTS, §1032.

[86] Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162 (1890); Isham v. Post, 141 N. Y. 100, 35 N. E. 1084 (1894); Wilson v. Brett, 11 M. & W. 113 (1843).

[87] Parker v. Union Ice & Salt Co., 59 Kan. 626, 54 Pac. 672 (1898); Knowles v. A. & St. L. Ry., 38 Me. 55 (1854); Beller v. Shultz, 44 Mich. 529 (1880); Hogan v. O'Brien, 212 App. Div. 193, 208 N. Y. Supp. 477 (3d Dept. 1925); Doorman v. Jenkins, 2 A. & E. 256 (1834).

man who without excuse walks into the store of another and deposits a box of expensive furs.

This suggestion is confirmed to some extent by those cases which hold that whether or not a bailor has a right to go upon the land of a bailee to recover his chattel depends upon whether or not the bailor was at fault in allowing the chattel to get there.[88] There is some authority, however, denying the right to enter even when the bailor was totally innocent, but such cases rest upon reasons of public policy not effecting the validity of the present argument.

The curious case of *Siegel v. Spear & Co.*[89] has caused discussion as an interesting but difficult case of contract.[90] Possibly it would be well to approach the case as one of bailment. The plaintiff had purchased furniture from the defendant and had given chattel mortgages to secure the purchase price. The plaintiff, desiring to move from the city for a short time, arranged with defendant through its agent to have defendant store the furniture free of charge. After the agreement to store the furniture had been made, the agent promised to have the furniture insured. The furniture was sent to the warehouse of defendant and was destroyed by fire without having been insured. The New York Court of Appeals affirmed a judgment for the plaintiff in an action based upon a breach of duty of the defendant to insure according to the promise.

If the case is considered as one of contract, the difficulty is to find a detriment to the promisee which was asked for or suffered in return for the promise to insure. As the promise to insure was made, not before, but after, the plaintiff's agreement to part with the furniture, it can scarcely be said that the plaintiff parted with the furniture in return for the promise to insure. The defendant had not asked for the parting with the furniture in return for the promise. Those who defend the case as one of contract must rely on the ground of promissory estoppel.

It would be easier to treat the promise to insure, not as a contract or promise enforceable because supported by consideration or even by promissory estoppel in the ordinary sense, but as any other circumstance creating duties in connection with a bailment. If the

[88]Newkirk v. Sabler, 9 Barb. 652 (N. Y. 1850); Sheldon v. Sherman, 42 N. Y. 484 (1870); Chambers v. Bedell, 2 W. & S. 225 (Pa. 1841); Foster v. Juniata Bridge Co., *supra* note 40; Read v. Smith, 2 N. B. (Berton) *173 (1836). See also Hoffman v. Armstrong, 48 N. Y. 201 (1872).

[89]234 N. Y. 479, 138 N. E. 414 (1923).

[90](1923) 9 CORNELL LAW QUARTERLY 54; (1923) 22 MICH. L. REV. 64; (1923) 32 YALE L. J. 609. See also Allegheny College v. National Chautauqua Co. Bank., 246 N. Y. 369, 159 N. E. 173 (1927).

bailee has peculiar facilities for protecting a bailed chattel, he must use them; if he has peculiar personal ability, he must use it; if the chattel is of a peculiar nature, he must not disregard it. All the circumstances connected with the bailment are to be considered in determining whether or not a bailee has acted properly. It is submitted that the promise to insure, even if without contractual effect, was such a circumstance. It had an important bearing upon what would be proper care. It was, indeed, the chief circumstance in this case, just as in some cases the chief circumstance is the bailee's receipt of compensation, or the bailee's possession of a strong safe, or his skill in handling horses. Perhaps that is nothing more than saying that it is a question of undertaking and perhaps there is an intimate connection between undertaking and estoppel. This explanation of the case, if admissible, at least avoids doing violence to the ordinary doctrine of consideration.[91]

If, as is suggested, the bailee in most, if not all cases of involuntary bailment, is under a duty to use some care toward the chattel, it must be remembered that this is not "slight care" as defined for a three-degree scale of care, but is reasonable care under the circumstances, which may be less than "slight care". If it is held that there are three absolute degrees of care, "slight care" is the minimum; there is no room in the scale for anything less than such as might be applied to voluntary bailments. Therefore, if a case was one where "slight" care could not be required, the easiest way to escape from the difficulty was to say that there was no bailment. Many cases decided before the days of the flexible rule of reasonable care under the circumstances can probably be explained in this way. But if the care to be used is reasonable care under the circumstances, the law is free to include within the definition of bailment cases which before have been bothersome anomalies. If there is care which is less than what is conventionally known as "slight care", its use can be required where less care should be required than in a voluntary gratuitous bailment. Under the three-degree system, there is no way of taking care of an involuntary bailment. Under the flexible scale of reasonable care under the circumstances, an involuntary bailment can be handled as easily as a voluntary bailment.

Some consequences of bailment do not depend upon such circumstances as those discussed and may follow from an involuntary bailment as well as from a normal one. For instance, the shifting to the bailee of the burden of going forward with the proof ought not to depend upon the bailor's blameworthiness for having forced possession

[91] See, *e. g.*, (1923) 32 YALE L. J. 609.

upon the bailee, but upon the principles which ordinarily govern the application of the rule "*res ipsa loquitur*". So it is not surprising to find that the possession and the failure to account throws on a landlord the burden of proceeding with the evidence in the case in which goods are left in a house by a tenant who moved out.[92]

The tradition of the legal profession for the last two and a quarter centuries ought not to be broken. By it a quotation from the opinion of Lord Holt in *Coggs v. Bernard*[93] is required in every treatment of bailments. Perhaps the following is appropriate: "I have said thus much in this case, because it is of great consequence that the law should be settled on this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that may happen, I have stirred these points which wiser heads in time may settle."[94]

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[92]*Supra* note 43.
[93]2 Ld. Raym. 909 (1703).
[94]*Ibid.* 920.