Chapter V

TORT AND BAILMENT[1]

THE relation of tort to breach of bailment and of bailment to contract is necessarily affected by the very early appearance of the idea of bailment in our law as covering any delivery of the possession of goods to another for any purpose. Moreover, all the forms of bailment which we know at the present day were recognized in Bracton's time.[2] This is one of the notably Romanesque parts of his book, and centuries later Chief Justice Holt, in founding the modern law of bailment, acted under similar influence. In Bracton's time, the relations of bailor to bailee are described simply enough. The bailee was strictly, perhaps absolutely, liable to the bailor for loss of, or injury to, the article bailed. That is what Glanvill says of the *commodatarius*,[3] and there is reason to think that it applied to other bailees.[4] Bracton, influenced by Roman law, was willing to mitigate this severe rule, which, incidentally, seems to be one of the very few genuine examples of "absolute" liability;[5] but his attempt was premature.[6] That is Maitland's view, but Britton does excuse the borrower for accident by fire, water, robbery or larceny, or accidents other than those due to negligence.[7] Professor Holdsworth

[1] For the history of bailment, see Street, *Foundations of Liability* (1906), ii, 251–307; Holdsworth, *History of English Law*, iii, 336–349; vii, 448–455; Ames, *Lectures on Legal History*, Index, "Bailment".

[2] Pollock & Maitland, ii, 169, 170.

[3] x, 13.

[4] Pollock & Maitland, ii, 171. Holdsworth, *op. cit.* iii, 338–339.

[5] 42 *Law Quarterly Review*, 37–51.

[6] Pollock & Maitland, ii, 171.

[7] Ed. Nichols, i, 157.

also admits that in the Year Books there are some indications of a tendency to modify the bailee's liability, though, in his opinion, these attempts were unsuccessful.[1] At any rate, where suit was possible at all, the bailee in general could sue for injury to, or loss of, the goods.

Now this right of the bailee was settled in our law before we had any real theory of contract, and therefore the relations of bailment to contract could scarcely have troubled lawyers. The bailee's right was consistently based on his possession of the chattel. Why then seek any other ground of liability at that period?

As to liability in what we should now call tort, in the fifteenth century the bailee who was guilty of negligent misfeasance in breach of his undertaking was liable to an action in tort based on his undertaking.[2] The normal remedy against the bailee was detinue. But the concurrent remedy of action on the case was needed, partly because the wager of law might be used by the defendant in detinue and might defeat the action, partly because, if the plaintiff had paid in advance for the safe custody of his property, he could by suing detinue recover, not his money, but only the value of the property.

Action upon the case first appears in this connection in 1449,[3] was impliedly recognized in 1472,[4] and was expressly upheld in 1487.[5] The action was in tort, not on contract. It was based, like the action against the surgeon or the carpenter, on an undertaking (an *as-*

[1] *Op. cit.* iii, 342–343. The learned author, however, gives examples from the Y.BB. which shew the development of the theory that if the bailee cannot sue (e.g. in damage by the King's enemies or the act of God) he is not liable to the bailor. *Ibid.* 343–344.

[2] Statham, *Abr.* Accion sur le cas (27 Hen. VI), 25, and Y.BB. Mich. 12 Ed. IV, pl. 10; Hil. 2 Hen. VII, pl. 9. Ames, *op. cit.* 132, 133.

[3] Statham, *Abr.* Accion sur le cas, 25.

[4] Y.B. Mich. 12 Ed. IV, f. 13, pl. 10.

[5] Y.B. Hil. 2 Hen. VII, f. 11, pl. 9.

sumpsit); and consideration was no more an essential of liability in the one case than in the other.[1] It is styled merely "action upon the case", but we may safely describe it as an action in tort. Liability of the "undertaking" type is much older than the application of *assumpsit* to make simple contracts enforceable. At first, it was necessary to allege *assumpsit* in suing this action upon the case, except against those bailees whose calling was of a quasi-public nature, such as the common carrier and innkeeper, for they were chargeable by the custom of the realm,[2] which may be taken as equivalent to the Common Law. In 1598, all four judges present in the Queen's Bench held that the action did not lie without such special *assumpsit*.[3] But in 1628, in an action against a common lighterman, the King's Bench held that the plaintiff could recover for the defendant's negligence though there had been no promise and no allegation that he was a common lighterman. The case well illustrates difficulties of classification of the action, for while the Chief Justice said that "delivery makes the contract", Whitlock J stated the action to be "*ex malefacto* not *ex contractu*".[4] However that may be, an express undertaking ceased to be necessary.[5] But meanwhile another element of confusion had insinuated itself into bailment. This was the doctrine of consideration. The seeds of this complication had been sown in Elizabethan times, and they produced a fair crop of inconsistent decisions in the course of the next century. Thus, where *A* had delivered wheat to *B*, and *B* had promised to redeliver it to *A* upon *A*'s request, there was undoubtedly a bailment, but when *A* sued *B* in an action

[1] Ames, *op. cit.* 132–133.
[2] *Ibid.* 134.
[3] *Mosley* v. *Fosset*, Moore, 543.
[4] *Symons* v. *Darknoll*, 81 Eng. Rep. 1202. Palmer, 523.
[5] Ames, *op. cit.* 135.

of *assumpsit*, nothing was said of bailment, but the King's Bench unanimously held the mere possession of the wheat to be "a good consideration"; but this was reversed in the Exchequer Chamber.[1] This application of consideration to bailments did not escape criticism and doubts,[2] but it was admitted by the whole court in 1608.[3] However, in 1623 the King's Bench veered round to the doctrine that, though there was no consideration in a gratuitous bailment, yet the mere detention of the thing bailed, to the detriment of the bailor, was damage to him upon which he could have his action;[4] but the report appears to put the doctrine aside altogether, and to make the bailee liable in spite of the absence of consideration.[5] Then in *Coggs* v. *Bernard*,[6] which has always been reckoned as the leading case on bailment, and the source of the modern law about it, the court swung back to the necessity of finding consideration. Holt C.J. and Gould J. discovered it in the fact that the owner had trusted the bailee with the goods,[7] and Powell J.'s view was not notably different.[8] The action itself in *Coggs* v. *Bernard* was upon the case, and alleged *assumpsit* on the defendant's part to take care, and neglect to do so.

"The truth is", says Professor Holdsworth, "that all these cases are really cases of delictual liability disguised by the form of

[1] *Riches* v. *Bridges* (1602) Cro. Eliz. 883, Yelv. 4. This is cited by Ames, *op. cit.* 134, note 3. His first citation seems to be wide of the mark. *Howlet* v. *Osborne*, Cro. Eliz. 380, was an action by a *third party* against the bailee.

[2] *Game* v. *Harvie* (1630) Yelv. 50. *Gelley* v. *Clerk* (1606) Cro. Jac. 188. Noy, 126.

[3] *Pickas* v. *Guide* Yelv. 128.

[4] *Loes Case* Palmer, 281; 81 Eng. Rep. 1083; reported as *Wheatley* v. *Low* Cro. Jac. 668. Ames pointed out the great strain which this put on the doctrine of consideration; *op. cit.* 134.

[5] Cf. Holdsworth, *op. cit.* iii, 449.

[6] (1703) 2 Ld Raym. 909.

[7] *Ibid.* 909, 919.

[8] *Ibid.* 911. Cf. Holdsworth, *op. cit.* iii, 449.

action. The whole difficulty arises from the fact that the courts allowed a cause of action founded on tort to masquerade as an action founded on contract. The parties were allowed to waive the tort and sue in contract."[1]

Another, though not necessarily dissimilar, impression left by the cases is that the courts never from the first made up their minds that the action was either in tort or on contract, partly because they never analysed "tort", partly because the peculiar origin of *assumpsit* would have puzzled any one who tried to draw a distinction between tort and contract, and partly because the position in our law of those who profess a quasi-public calling was obscure then and even at the present day is not clearly ascertained.[2]

At the beginning of the seventeenth century, the bailee was liable to the bailor:

(i) in detinue, if he did not redeliver the goods;
(ii) in trover, if he converted them;
(iii) in an action upon the case, if he damaged them by negligence, or other wrongful act falling short of conversion.[3]

During the seventeenth and succeeding centuries, the contractual element became more prominent.[4] Sir William Jones, in his final definition of bailment,[5] says that it is "a delivery of goods in trust, on a contract express or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed".

[1] Holdsworth, *op. cit.* iii, 449–450.
[2] Cf. O. W. Holmes, *Common Law*, 187.
[3] Holdsworth, *op. cit.* vii, 433.
[4] *Ibid.*
[5] *Law of Bailments* (1781), 117. It is not stated in his first definition (p. 1), but it is almost instantly implied in the succeeding pages. His strenuous argument that neither consideration *nor feasance* is necessary to found an action on bailment, because that is a peculiarity of bailment cannot now be accepted. Cf. Story, *Bailments* (1839), 6.

We can make this our point of departure for distinguishing at the present day bailment from contract on the one hand and from obligation in tort on the other hand.

It is singular that not more has been done in the way of analyzing the position of bailment in modern law. Sir William Jones and Story were too much hampered by procedural cross-currents to set any very clear course in their time. To-day, something, but not much, might have been expected of monographs for the use of practitioners, but even that small amount is not forthcoming. In jurisprudential literature the omission is more surprising. One of the two leading English textbooks which profess to deal exhaustively with jurisprudence does not even index "Bailment"[1] and the other rests satisfied with the cut-and-dried idea that it is a species of contract.[2] Professor Terry's work, published in the United States, devotes more attention to the abstract side of the subject than it has met with here.[3]

If we adhered to the definition of bailment in most of the textbooks, we should have to place it under the law of contract. With more or less modification they take over the definition which we have just cited from Sir William Jones.[4] In two other learned works, however, it is pointed out that bailment may exist independently of contract,[5] and there is authority in support of this which, if indirect, is of respectable weight. In *R.* v.

[1] Salmond, *Jurisprudence* (7th ed. 1924).

[2] Holland, *Jurisprudence* (13th ed. 1924), 289 *seq.*

[3] *Leading Principles of Anglo-American Law* (1884), Index "Bailment".

[4] Story, *Bailments* (1839). Wyatt Paine, *Bailment* (1901), 2. Williams, *Personal Property* (18th ed. 1926), 57. 1 *Laws of England* (Halsbury), § 1071.

[5] Pollock & Wright, *Possession* (1888), 41 note 1, 160. Goodeve, *Personal Property* (6th ed. 1926), 25.

Robson,[1] a married woman was held by the Court for Crown Cases Reserved to have been rightly convicted of larceny as a bailee under the Act of 1857.[2] It was argued in her defence that a bailment is a contract and that she could not contract (which, in fact, was the general rule then). But Martin and Pollock BB. were of opinion that she might nevertheless become a bailee within the statute. This must be taken to have overruled *R.* v. *Denmour*[3] where Martin B. had ruled to the contrary earlier in the same year. Again, in *R.* v. *McDonald*,[4] a minor over fourteen years of age was held to have been rightly convicted of larceny as a bailee of goods which he had fraudulently converted to his own use. Some doubt was raised as to the correctness of this decision and it was re-argued before thirteen judges, the majority of whom held that McDonald was properly convicted. It appears from *R.* v. *Ashwell*[5] that Lord Coleridge C.J. was one of the minority judges in *R.* v. *McDonald*, for he said as much in *R.* v. *Ashwell*, and adopted his opinion in the earlier case that "bailment is not a mere delivery on a contract, but is a contract itself". But his support of this amounted to no more than the citation of the older textbooks and they do not say *why* bailment must always be identified with contract. Upon the whole, though the authorities are not conclusive in the absence of a decision in a civil case, the view that bailment may exist without any contract is in accordance with the conception of it and with its actual treatment as a separate branch of the law. Writers on the law of contract do not usually deal with it as one limb of their subject. Where they have done so, they have either ignored the difficulty of co-ordinating gratuitous bail-

[1] (1861) 31 L.J.N.S. (M.C.) 22.
[2] 20 & 21 Vict. c. 54, s. 4.
[3] (1861) 8 Cox, 440.
[4] (1885) 15 Q.B.D. 323.
[5] (1885) 16 Q.B.D. 190, 223–224.

ments with the doctrine of consideration,[1] or have achieved reconciliation of the two by reliance on older theories of bailment.[2] Where the gratuitous bailment involves parting with the possession of goods, consideration may be found in the detriment of giving up such possession, but the theory is not without its difficulties, as Sir Frederick Pollock has noted.[3] Where it is for gratuitous services, the difficulties are still greater.[4]

Next as to tort. In two respects we can mark it off from breach of bailment.

(1) In the law of tort the duty is towards persons generally, but the duties of the parties in bailment are towards each other and do not travel beyond that.

(2) Liability in tort is primarily fixed by the law itself, irrespective of the assent of the persons bound; but in bailment it is primarily fixed by the parties themselves. When once they have entered into the relation, a good many legal consequences follow and some of them were probably never contemplated by either bailor or bailee. But just the same sort of thing occurs with many of the obligations that arise from contract, yet no one doubts that it is by the parties to it, and not by the law, that the obligations arising from contract are primarily imposed. What happens in the way of secondary duties which are annexed to bailments by the law does not here concern us. A bailee, like a contractor, may protest against some of them as harsh and not contemplated by him when he became a bailee, but that does not alter the fact that primarily it was he, and not the law, that brought into being the legal relation to which these consequences are attached. Bailment originates in an agreement, express or implied, and

[1] Chitty, *Contracts* (17th ed. 1921), 490–494.
[2] Addison, *Contracts* (11th ed. 1911).
[3] *Contract* (9th ed. 1921), 188.
[4] Anson, *Contract* (17th ed. 1929), 101–102.

tortious liability does not. Historically, this might be a debatable point, for, as we have shewn, it would be almost impossible at one period of the development of bailment to say whether the bailee's liability sprang from tort or from contract, but we are concerned with the law here and now; and, though it is possible, according to the balance of opinion, to have a bailment without a contract, it is not possible to have it without agreement. A man cannot without his knowledge and consent be considered as a bailee of property. So Abbott C.J. in *Lethbridge* v. *Phillips*,[1] where a miniature portrait belonging to the plaintiff was handed by a third person, with the assent of the plaintiff, but not with that of the defendant, to the defendant's son for the purpose of shewing it to the defendant. The son took it to his father's house, and it was much damaged by being placed on a mantelpiece too near a large stove. The defendant was held not liable.[2] It is not within our province to notice the circumstances from which agreement may be implied in cases like *Lethbridge* v. *Phillips*, or those in which, agreement or no agreement, a recipient of goods which he has not demanded may incur liability.[3] The main rule is clear enough and indeed is a practical necessity, unless every one is to be placed at the mercy of pushing tradesmen who send goods that have not been solicited.

The upshot is that bailment is more fittingly regarded as a distinct branch of the Law of Property, under the title Possession than as appropriate to either the law of contract or the law of tort. This is far from saying that remedies in contract or in tort are inapplicable to breach of bailment. If there be a contract, as there very fre-

[1] (1819) 2 Stark. 544.

[2] So too *Howard* v. *Harris* (1884) Cab. & Ellis, 253. Paine, *Bailments* (1901), 18, 19.

[3] See 1 *Laws of England* (Halsbury), § 1078.

quently is, in a bailment, then an action on contract is one of the remedies. If, again, the bailee has committed negligence, or any other tort in connection with the property bailed, then he is liable in tort. Here the analysis is apt to be obscured by the fact that at the time of Holt's judgment in *Coggs* v. *Bernard* negligence was not an independent tort, but rather a mode in which certain wrongs could be committed. Nowadays, it is clearly an independent tort as well as a mode of unlawful conduct, and it is not by any means the only tort for which a bailee or bailor may be reciprocally liable with respect to the thing bailed. But to treat bailment purely as a matter of contract or of tort is not an adequate explanation of its position in the legal system. It is true that books of pleading appear to thrust this dichotomy upon it. One would infer from Bullen and Leake's *Precedents of Pleadings* that the action is either on contract[1] or in tort,[2] but not for breach of "bailment". At any rate no mention of bailment is to be found in their precedents of statements of claim. It may well be that this is because nearly every action against the bailee can be reduced to either contract or tort, but there seems to be no inherent reason why a statement of claim in an action between bailor and bailee should not allege breach of bailment as the sole ground of the action. It is true, also, that for the purposes of the County Court Acts, an action founded upon the Common Law liability of a bailee is founded on tort,[3] but in trying to arrange the legal system we need not be terrified by legislative insistence upon "contract or tort, and nothing else" in a limited class of cases.

The salient feature of bailment is, as we have said, the element of possession. Bailment is not only one of the modes of transferring possession, but while the

[1] 8th ed. (1924), 104–106. [2] *Ibid.* 341–345.
[3] *Turner* v. *Stallibrass* [1898] 1 Q.B. 56.

bailment lasts it connotes possession. As between bailor and bailee that was recognized very early in our law. As between the bailee and a third party, it was very late in our history that this was settled. The older view was that he could sue the third party who interfered with the property bailed only if he (the bailee) were liable over to the bailor. But in *The Winkfield*[1] it was decided that the reason why he can sue a third party who negligently injures the goods is simply because he has possession. It has been admirably shewn elsewhere why this decision was historically correct, and why its arrival lagged until the early twentieth century.[2]

This conspicuous element of possession is a justification for separating bailment from both contract and tort. As to contract, putting aside gratuitous bailments for the moment, the tendency in books of practice, as well as in books of jurisprudence, is to treat contracts which transfer rights *in rem* on a basis different from that of other contracts. They are considered, and quite rightly so, just like other contracts in so far as they are mere vehicles for carrying the right *in rem* from one person to another. But when once the transfer is accomplished, a host of rights and duties arises which take in persons generally as well as the contracting parties. They are all incidental to property, and have no necessary connection whatever with the contract, the vehicle which transferred them. Any other vehicle recognized by the law would have done as well, e.g. gift. Such contracts are therefore usually isolated and treated as separate topics so far as their effects are concerned, and, as it is difficult to expound their effects without describing their origin, the contract *and* its effects are examined together. It may look like a confusion of rights *in personam* with rights *in rem*, or, if the phrases be preferred,

[1] [1902] P. 42.

[2] Holdsworth, *op. cit.* vii, 451–455; also iii, 336–350.

of obligation with property; but it is justifiable on the score of convenience, and indeed of practical necessity. A practitioner prefers to consult one book instead of two. Examples of topics of the "contract-conveyance" type (if we may coin the phrase), which have been successfully isolated in this way are sales and leases. Even if bailments were always based on contracts, there would be quite as much reason for isolating them from contracts in general, because, by giving the bailee possession of the goods, they force upon us a consideration of that esoteric right *in rem*. But the argument in favour of this separation becomes overwhelming if, as appears to be the better view, it is possible to have bailments which are independent of contract altogether.

As to tort, reasons have already been put forward for regarding breach of bailment as not necessarily coincident with liability in tort. It is true that the bailee, having possession, can, of course, sue any third person for infringement of it and that this action is unquestionably in tort, and, in proper circumstances, will lie against the bailor also. It is equally true that the bailor can also sue a third person for injury to his outstanding right of ownership, while the chattel is in the bailee's hands; and that, if the bailee has wrongfully determined the bailment, the bailor can sue not only him, but also third persons who deal in any way with the chattel.[1] But these actions in tort are remedies, not upon bailment *per se*, but for injuries to possession. Such remedies would be the same, however possession arose, whether by bailment or in any other way; they are inadequate to explain what may be called the static side of bailment, i.e. its mode of creation and its varieties, and they do not exhaust its dynamic side, i.e. the remedies incidental to it.

[1] 1 *Laws of England* (Halsbury), § 1142.