

PALMER
ON
BAILMENT

THIRD EDITION

SWEET & MAXWELL

EXTRACT FROM PREFACE TO THE FIRST EDITION

In writing this book, I have tried to do three things: to provide a guide for practitioners upon the problems of bailment that commonly arise in practice; to provide a source from which students may discover more about a legal relationship normally neglected by other writers; and to place the bailment relation within its proper perspective in the modern sphere of obligations.

I am all too aware that these may prove conflicting objectives. If compelled to choose, I would attach most significance to the third. In accordance with this objective I have cited freely from Commonwealth and American case law and have not hesitated to present decisions which are factually or conceptually interesting alongside those of higher authority. I considered this course to be justified because so much of the modern province of bailment is uncharted and remains in the shape of ideas rather than of settled rules. In the event, I think I have covered every important or interesting Commonwealth decision upon the subject, including many from fairly small jurisdictions such as Ireland, the West Indies and Papua and New Guinea. In addition, the important statutory provisions in England and Australia are discussed. I hope, therefore, that the book will be found useful throughout the English-speaking world.

This does not purport to be a book upon the history of bailment. I have confined historical analysis to a minimum and have concentrated instead upon the character, content and likely development of the relation in the light of modern judicial analysis. If some of the resultant ideas appear precarious, I trust that the book will at least serve to generate debate and will lead to a greater eventual clarity. In this connection, I am happy to rely upon the words of Lord Holt in the great case of *Coggs v Bernard*:

"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."

I have profited greatly from professional collaboration and informal exchanges with Richard Atkinson, Judge Anthony Davies, Professor David Carey Miller, Dr Steven Cheshire, Professor John G. G. Jones, Sir Matthew Parry GVO, Dr Rebecca French, Professor Michael P. G. Jones, Professor Anthony Griffiths, Maria van Hecke, David Johnson, Dr. John G. Jones, Professor Pierre Lalive, Edward Manisty, Lisa O'Sullivan, the late Brian Popper OBE, Nicholas Pountney, Professor Marc-Andre Renold, Jeremy Scott, Professor Tania Sanyal, Mark Stephens, Greg Toller, Peter Tree SC, Professor Ron Smeaton, Professor Kate Vane, Dr. Martina Weller and Jonathan Wood.

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- (3) it must encroach so extensively on the rights of the owner as to exclude him from use and possession of the goods.⁵¹²

The essential feature of the tort of conversion is the denial by the defendant of the possessory interest or title of the plaintiff in the goods, which may occur where he manifests an assertion of rights or dominion over the goods that is inconsistent with the plaintiff's rights.⁵¹³ Of particular significance, it is submitted, are the words of Lord Steyn and Mummery L.J. referring to any encroachment on a claimant's right of possession. Despite occasional erroneous suggestions that conversion can be committed only where there exists an incursion on the claimant's "title" in the sense of general property,⁵¹⁴ it is settled that it is the immediate right of possession that constitutes the essential qualification to a claim in conversion⁵¹⁵ and that it is for incursions on the immediate right of possession that conversion now offers redress.⁵¹⁶

The principles that characterise an act as conversion, and identify the plaintiff's title to sue, are of general application; they do not depend upon either party's being party to a bailment. For the most part, the assimilation of those principles into the bailment context is straightforward and unexceptional. Thus, a bailor who enjoys the immediate right to possess may sue both his bailee and any third party who commits an act of conversion; and a bailee who rebails the chattel to his bailor for a limited purpose or period may maintain conversion for conduct occurring after the agreed events have expired.

1-092 However, a number of special observations should be made about the operation of this remedy against a bailee:

- (1) It is said that a bailee does not commit conversion by putting the goods in the care or custody of his servant,⁵¹⁷ even, it seems, where the bailor has not explicitly countenanced this delegation. The traditional reason is that the servant does not acquire possession and there is accordingly no interference with the bailor's right to possess; the

⁵¹² *Kuwait Airways Corp. v Iraqi Airways Co (No.6)* [2002] UKHL 19, [2002] 2 A.C. 883 at para.39. Lord Nicholls further held (at para.40) that an owner can be deprived of possession where he is excluded from possession or possession is withheld from him.

⁵¹³ *Ibid.*, at para.119 per Lord Steyn. Further influential definitions are those of Lord Templeman in *Maynegrain Pty v Compafina Bank* (1984) 58 A.L.J.R. 389 at 392 PC ("conversion consists of a positive wrongful act of dealing with goods in a manner inconsistent with the rights of the owner") and of Lord Chelmsford in *Hollins v Fowler* (1874) LR 7 Q.B. 757 at 795 ("... any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit, or that of another person, is guilty of conversion").

⁵¹⁴ *Marq v Christie Manson & Woods Ltd* [2004] Q.B. 286 at paras.14, 18, 19 (citing *Consolidated Co Ltd v Curtis* [1892] 1 Q.B. 495 at 497-498 per Collins J.), 24 per Tuckey L.J., as to which see Hudson (2005) 10 *Art Antiquity and Law* 201 at pp.212-213.

⁵¹⁵ *Government of the Islamic Republic of Iraq v Barakat Galleries Ltd* [2007] EWCA Civ 1374, [2009] Q.B. 22, [2008] 1 All E.R. 1177. The claimant might alternatively rely on possession itself at the time of the wrong, as in the case of a direct and unauthorised taking from him. In this case even the possession of a finder or a thief may suffice to sustain the claim. See generally Ch.4 (Possessory Title).

⁵¹⁶ In the *Kuwait* case (at para.78) Lord Nicholls cited with approval Diplock L.J.'s statement in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 W.L.R. 956 at 970-971 that one's duty to one's neighbour is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his property or possessory rights in them (emphasis added). Lord Nicholls continued: "Whether the defendant still has the goods or their proceeds matters not. Nor does it matter whether the defendant was a thief or acted in the genuine and reasonable belief the goods were his." Later he says that the basis of conversion is the exclusion of the owner "from possession of his goods." (at para.82, and see para.83). Lord Steyn (at para.119) said the essential feature of the tort of conversion is the denial by the defendant of the possessory interest or title of the plaintiff in the goods, which may occur where he manifests an assertion of rights or dominion over the goods which is inconsistent with the plaintiff's rights.

⁵¹⁷ *Canot v Hughes* (1836) 2 Bing. N.C. 448; 132 E.R. 176, where the "servant" in question was an attorney; cf. *Alexander v Southey* (1821) 5 B. & Aid. 247; 106 E.R. 1183.

bailee does not alter his own position in relation to the goods.⁵¹⁸ But it is suggested that this rule must be read subject to the nature of the transfer and to the possibility that a servant may, in certain circumstances, be constituted a bailee.⁵¹⁹ In most cases, a bailor can be taken to have consented to the delegation of the bailee's duty to a competent and honest servant. Where the servant is not of this description, or where such delegation is in any event prohibited by the terms of the bailment, the risk to the goods or the deliberate misdealing with them may well constitute a conversion, whether the servant actually gets possession or not. This is an area in which it is impossible to be dogmatic, for each case must clearly depend on its own facts.

- (2) A bailee who holds over on the expiration of the bailment does not per se become a converter.⁵²⁰ Whether he is guilty of conversion depends upon the intention with which he retains the goods and the sort of conduct by which he effects that retention. He continues, in any event, to owe the duties of a bailee, and if the delay in redelivery is due to his own fault he will become an insurer of the goods.

- (3) On the other hand, it seems clear that a bailee who, wrongfully and without authority, sub-bails the goods to an independent third party, does commit a conversion. In this case he has parted with possession and has, at least potentially, impaired the bailor's ability to recover the goods. In *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd*,⁵²¹ there was held to be a conversion where the subcontractors were chosen negligently and the goods were subsequently stolen. It is submitted that, even without these additional factors, the unauthorised nature of the sub-bailment may have sufficed to raise a case in conversion against the principal bailees. However, much may depend upon the degree of risk to the goods and the circumstances under which the sub-bailment was made. A conscionable breach of orders in an unforeseen emergency is clearly entitled to a more favourable interpretation than a breach brought about by laziness or inefficiency. In such a case, the court may be willing to deny that there has been a conversion and to hold the bailee liable only for actual losses consequent upon his deviation (if any) from the terms of the bailment. Again, however, it will be largely a question of fact.

So far as concerns the sub-bailee himself, it is submitted that liability depends upon whether he knew that the sub-bailment was unauthorised. If he did not, he should be regarded as occupying a similar position to the finder, who does not convert merely by taking the chattel into his custody. It may be otherwise, however, where the sub-bailee asserts a lien in respect of work he has performed on the goods.

- (4) Involuntary bailees⁵²² appear to be exempt from the traditionally strict liability in conversion and, provided they deal with the chattel in good faith, to be liable only if negligent. Such at least has been held to be the rule where the bailee is attempting to restore the goods to their owner,⁵²³ and it seems that this principle is of general application.

- (5) The identification of conduct as conversion can cause difficulties where the defendant is a sub-bailee who knows of a particular prohibition within the original bailment. Suppose, for instance, that A bails bottles to B, forbidding him to fill them with wine not

⁵¹⁸ Fleming, op. cit., p.58.

⁵¹⁹ See generally Ch.7.

⁵²⁰ *Cmd 4774*, para.40. Cf. *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep. 197; below, para.23-060.

⁵²¹ [1967] 2 All E.R. 940. And see *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] Q.B. 1509 CA, at para.67 per Mance L.J.

⁵²² Discussed in Ch.13; arguably not bailees at all.

⁵²³ *Elvin Powell & Co Ltd v Plummer Roddis Ltd* (1933) 50 T.L.R. 158; below, para.13-017.

manufactured by A; and that B sub-bails the bottles to C, who knows of the original prohibition. Taken in the abstract, a filling of the bottles by C may or may not amount to conversion. The question is whether its identity as such is strengthened or established by C's knowledge (as a sub-bailee) that this is something A has forbidden B to do. This problem arose in *Penfolds Wines Pty Ltd v Elliott*,⁵²⁴ where Latham C.J. clearly considered the terms of the earlier bailment relevant to the liability of the secondary bailee:

"I assume (and I think rightly) in favour of the defendant that his brother, who obtained the bottles from a retailer of the plaintiff's wines, was a sub-bailee of the bottles with the same rights as against the plaintiff as the original bailee (the retailer) including a right to use the bottles for the purpose of once using etc. the wine made by plaintiff contained in the bottles, but not including any right to use the bottles for other wine or to deliver them to any person other than the plaintiff. If the defendant's brother is regarded as being a sub-bailee holding the bottles upon the same terms as the original bailee, his delivery of the bottles to the defendant to be filled with wine other than the plaintiff's wine and to be returned to him was . . . therefore 'a determination of the lawful [sub] bailment and caused the possessory title to revert to the bailor and entitled him to maintain an action of trover' . . . the contract between the bailor and the bailee was never meant to authorise the bailee 'to do more than use the chattels and not to give the use to a third person' . . . In the present case the terms of the bailment expressly prohibited the use of the bottles for purposes other than those expressed, and the transfer of the possession of the bottles for such a purpose was a prohibited act: it was unquestionably wrong and determined the bailment, and therefore would have entitled the plaintiff to sue the defendant's brother in trover."⁵²⁵

In many cases, of course, the sub-bailee's misconduct will be of a kind that constitutes conversion in any event, irrespective of any known prohibition that the bailor has imposed on an intervening bailee. In others, his knowledge of a particular way in which the bailor desires his chattel not to be handled may suffice to make him guilty of conversion, irrespective of whether he personally holds the goods under a sub-bailment. But in residual cases, his possession of the chattel may suffice to create in him positive obligations, the breach of which may constitute a sufficiently wrongful act between him and the original bailor to make his conduct actionable. If it is thus actionable, the further question arises as to whether the appropriate remedy is one for a breach of the terms of the bailment or an action for conversion. Opinion is divided as to whether the commission of this tort should depend upon the terms of any contract between the parties.⁵²⁶ If affirmative duties can be undertaken under a sub-bailment, irrespective of contract, it may follow that these obligations likewise possess a value in characterising the sub-bailee's conduct as a conversion; alternatively, it may follow that the latter remedy is otiose in these circumstances and that the demands of individual cases can be justly met by the independent action upon the bailment: an action which (like the brother's obligations in the *Penfold* case) does not depend upon contract and may be entirely separate from tort. As to the imposition of such affirmative duties, there is modern authority in favour⁵²⁷ and older authority against.⁵²⁸ The sub-bailee is said, of course, to be under a duty not to convert but there is no explicit

⁵²⁴ (1946) 74 C.L.R. 204; and see *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (1992) Aust Torts Reports 81-161.

⁵²⁵ (1946) 74 C.L.R. 204 at 217-218. Cf. at 224, 229-230 per Dixon J.

⁵²⁶ Below, para.21-073; and see the 2nd edn of this book, pp.214 et seq.

⁵²⁷ *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] QB 1270; and see the dictum of Latham C.J. above, fn.525.

⁵²⁸ *BWIA v Bart* (1966) 11 W.L.R. 378; see also now *The Forum Craftsman* [1985] 1 Lloyd's Rep. 291 CA; below, para.23-044.

authority suggesting that the terms upon which he accepted the goods may, as between himself and the principal bailor, define what is or is not a conversion.⁵²⁹ It will be submitted later⁵³⁰ that such obligations should (in certain circumstances) be recognised. When they do, a breach of them may render the sub-bailee liable for conversion in circumstances where, if no sub-bailment existed, no such liability could itself exist.

(6) At common law a bailee is estopped, except in limited circumstances, from denying the bailor's title to the goods and from pleading *jus tertii*. This principle is considered in more detail elsewhere.⁵³¹

(7) At common law a bailee whose failure to take reasonable care leads to the loss of his bailor's goods, or to their damage or destruction, is not guilty of conversion.⁵³² In England, however, this position has been substantially modified by statute. By s.2(2) of the Torts (Interference with Goods) Act 1977:

"An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been *detinue* before *detinue* was abolished)."

This provision gives rise to a number of difficulties, which are discussed earlier in the present chapter.⁵³³

(8) A purely "ministerial" handling of goods (by which the handler purports to change only the position of the goods and not to transfer or otherwise affect some proprietary or possessory interest in them) is not a conversion, if performed at the request of an apparent owner who has the actual control of the goods.⁵³⁴ One strand of this general exemption protects non-invasive bailees such as warehousemen or carriers, who merely return goods to the party from whom they received them, or deliver them onwards at that party's instruction. According to Blackburn J. in *Hollins v Fowler*⁵³⁵:

"I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the bona fide belief that the custodian is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he

⁵²⁹ This is not to say that such a principle ought not to be recognised in appropriate cases. It was formerly held that a sub-bailee may, by the terms of his sub-bailment, conclusively define the ambit of his duty of care (if any) towards the owner, irrespective of the owner's lack of consent to the terms of the sub-bailment and irrespective of the absence of any contract between them: *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215, overruled in *The Pioneer Container* [1994] 2 A.C. 324 PC. The repudiation of this principle may not be echoed in jurisdictions outside England and Wales. If the terms of the sub-bailment continue to be relevant in defining what constitutes negligence on the part of the sub-bailee, they might arguably also be relevant in defining what constitutes conversion. The arguments in favour of equating the two torts for this purpose would have been particularly persuasive in relation to those cases of "statutory" conversion which fall within the Torts (Interference with Goods) Act 1977 s.2(2).

⁵³⁰ Below, para.23-038.

⁵³¹ Below, Ch.4; cf. Torts (Interference with Goods) Act 1977 ss.7-8.

⁵³² See, for example, *RM Campbell (Vehicle Sales) Pty Ltd v Machnig* (Unreported, 22 May 1981, NSWSC, Commercial Division) per Yeldham J. ("the mere omission or negligence of a carrier is not conversion") following *The Arpad* [1934] p.189 at 232.

⁵³³ Above, paras.1-089, 1-090.

⁵³⁴ Cmnd 4774, para.46.

⁵³⁵ (1874) LR 7 HL 757 at 766-767. See also *Penfolds Wines Pty Ltd v Elliott* (1946) 74 C.L.R. 204 at 229; Cmnd 4774, para.46.

was a finder of the goods, or intrusted with their custody. I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties. Thus a warehouseman with whom goods had been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner . . . And the same principle would apply to . . . person acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger."

1-093 The limits to this principle are strict.⁵³⁶ On Blackburn J.'s analysis it appears that the handler must be acting in a subsidiary character: a warehouseman would satisfy that quality but it is submitted that a hirer, a pledgee or a buyer under a conditional sale would not.⁵³⁷ The handler will then be relieved only if:

- (1) he deals with the goods at the request of the actual custodian in the bona fide belief that that person is the true owner, or has the true owner's authority, and
- (2) the act of the defendant is of a kind which would be excused if done by the authority of the person in possession, if the person in possession were the finder of the goods or entrusted with their custody.⁵³⁸

This test is not easy to apply and there is at least one case where a defendant escaped liability although the impugned conduct involved transferring the goods to a third person in pursuance of a sale by the defendant's employer.⁵³⁹ Despite criticism from other quarters,⁵⁴⁰

⁵³⁶ It might be argued that the principle itself is outdated and no longer necessary. In 1875 bailees were estopped from denying their bailors' title. The common law, concerned that opportunistic bailees might play off one rival claimant against another, prohibited pleas of third party title and excluded evidence of such title. Immunity on redelivery was intimately linked to the estoppel. If bailees could not deny title, there was no point in encouraging them to seek evidence of *jus tertii* and it may thus have been justifiable to give them a defence when they simply returned the goods to their bailors. Nowadays, however, bailees can show that persons other than their bailors have a better title to the goods and bailors can now be required to supply particulars of third party interests: Torts (Interference with Goods) Act 1977 s.8(1) and (2) and CPR 19.5A, inserted by Civil Procedure (Amendment) Rules 2001. Reversal of the bailee's estoppel arguably renders unnecessary the related immunity on redelivery, or at least invites reconsideration of that immunity. It may now be proper to require more of a modern bailee of stolen goods than a mere unquestioning redelivery to his bailor, and to require him, at least, to take care to seek and act on discoverable information about the true title, because there is now some step he can take when such information is discovered.

⁵³⁷ It is quite possible, if not very likely, that such a recipient would have committed conversion by the original receipt of the goods and/or by the exercise of rights under the transaction. A pledgee converts by receiving goods under an unauthorised pledge where the pledgor converts by bailing them to him: Torts (Interference with Goods) Act 1977 s.11(2); Ch.22.

⁵³⁸ *Hollins v Fowler* (1875) L.R. 7 H.L. 757 at 766-767.

⁵³⁹ *National Mercantile Bank Ltd v Rymill* (1881) 44 L.T. 767, where the auctioneer delivered goods to a third person knowing that his client, who had originally deposited them with him for sale, had privately sold them to that third person, and having been instructed to make the delivery: *aliter*, if the defendant had actually effected the sale or, of course, if he had known of the adverse claim: cf. *RH Willis & Son v British Car Auctions Ltd* [1978] 2 All E.R. 392. For a further interesting example of the doctrine of the purely ministerial act, see the decision of Mahon J. in *Property Life Insurance Ltd v Edgar* (Unreported, 15 March 1980, New Zealand Sup. Ct); below, para.13-018.

⁵⁴⁰ Salmond, *op. cit.*, p.117, considers the decision inconsistent with both *Hollins v Fowler* (1875) L.R. 7 H.L. 757 and *Stephens v Elwall* (1815) 4 M. & S. 259; 105 E.R. 830, though it is conceded that there may be a distinction between the last of these cases and the decision in *Rymill* in that in the latter case "the goods were sent out of the jurisdiction to America which even today would be considered to have made it substantially more difficult for the true owner to recover them": Cmnd 4774, para.41. See also *James v Oxley* (1939) 61 C.L.R. 433; *Powell v Hoyland* (1851) 6 Ex. 67; 155 E.R. 456; and *RH Willis and Son v British Car Auctions Ltd* [1978] 2 All E.R. 392.

and the Law Reform Committee's own reservations, the Law Reform Committee recommended against a statutory reversal of the decision,⁵⁴¹ and a later Court of Appeal seems to have been content to rely on it to exonerate an auctioneer who returned unsold goods to the non-owning consignor.⁵⁴² But the defendant's conduct must still (it seems) satisfy the general requirements of changing no more than the location of the goods where the act in question results from a measure of discretion on its part, or represents a departure from the ordinary role played by institutions of the same character.⁵⁴³ In *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd*⁵⁴⁴ the respondent bank, acting on behalf of an Israeli company, ordered machines from the appellants. The goods were duly shipped to Israel and the documents of title were forwarded to the respondents. They, instead of behaving in the usual manner of bankers and paying for the goods, sent the documents to the Israeli company. Lord Denning said⁵⁴⁵:

"That is the plainest possible conversion. It is not a mere ministerial act. It is assuming dominion over the goods themselves by means of the documents of title."

Recent authority suggests a further and controversial enlargement of the Blackburn principle of immunity. In *Marcq v Christie Manson & Woods Ltd*⁵⁴⁶ Tuckey L.J. conceded that the Blackburn principle was not in itself adequate to protect auctioneers "since they are not simply entrusted with the custody of goods but also asked to sell them." Having so held, however, Tuckey L.J. went on to formulate what was effectively a general immunity for auctioneers who, without notice of the true owner's interest, return unsold goods to their consignors:

"... an auctioneer who receives goods from their apparent owner and simply redelivers them to him when they are unsold is not liable in conversion provided he has acted in good faith and without knowledge of any adverse claim to them. Although the cases do not strictly compel this conclusion they cannot simply be set aside . . . The auctioneer intends to sell and if he does so will incur liability if he delivers the goods to the buyer. But his intention does not make him liable; it is what he does in relation to the goods which determines liability. Mere receipt of the goods does not amount to conversion. In receiving the goods from and delivering them to their apparent owner the auctioneer in such a case has only acted ministerially. He has in the event merely changed the position of the goods and not the property in them."⁵⁴⁷

An unruly pantomime horse

1-094 The immunity recognised in *Marcq* exceeds the constraints of Blackburn J.'s principle and arguably renders that principle redundant. It does so, however, without

⁵⁴¹ Cmnd 4774, para.47. No change to the general rule is effected by the Torts (Interference with Goods) Act 1977.

⁵⁴² *Marcq v Christie Manson & Woods Ltd* [2004] Q.B. 286 at 299, para.17 (and see further at 301-302, paras.21, 23) per Tuckey L.J., who did however remark at para.21 that "The case has been criticised, mainly for the conclusion that there had been no sale by the auctioneer." In fact there are few, if any, cases in the law of conversion that have attracted greater obloquy than *National Mercantile Bank v Rymill*: see for example the doubts of Lord Denning M.R. and Roskill L.J. in *RH Willis and Son v British Car Auctions Ltd* [1978] 2 All E.R. 392 at 396 and 397 respectively, and see further at 399 per Browne L.J., who left the validity of the decision open, finding it distinguishable on the facts.

⁵⁴³ But cf. *Property Life Insurance Ltd v Edgar* (Unreported, 15 March 1980, New Zealand Sup. Ct).

⁵⁴⁴ [1973] 2 Lloyd's Rep. 101.

⁵⁴⁵ *Ibid.*, at 103.

⁵⁴⁶ [2004] Q.B. 286 at p.299, para.15.

⁵⁴⁷ [2004] Q.B. 286 at 302, para.24.

supplying any integrated general principle to take its place. It prescribes a rule for auctioneers without either explaining why auctioneers should benefit from some special rule not available to other bailees, or indicating whether an equivalent rule does protect other bailees who fall beyond the core principle stated by Blackburn J. At first sight it would seem eccentric to confine the privilege to auctioneers as compared to other bailees such as dealers on commission, but it was on the strength of cases specifically involving auctioneers that Tuckey L.J. purported to found the exemption.⁵⁴⁸

A further difficulty, however, is that the authorities on which Tuckey L.J. relied did not carry the point. They were all cases where the auctioneers sold (or were instrumental in the sale of) the goods.⁵⁴⁹ Liability for the return of unsold goods (as occurred in *Marcq*) was not argued, did not fall for decision and attracted no pronouncement even by way of dictum in any of those decisions. The Court of Appeal appears to have regarded these decisions as prescribing the entire sum of the auctioneer's liabilities in conversion, and to have concluded that an auctioneer who has been held liable in Fact Situation A is exempted by reason of that decision alone from liability in Fact Situation B. In construing prior case law on the liability of auctioneers as binding authority against a strict liability in conversion on the novel facts now before the court, and in discovering what appears to have been devised as a special head of immunity for auctioneers who return goods to their consignors on facts outside those contemplated by the dictum of Blackburn J. in *Hollins v Fowler*, the judgment in *Marcq* appears questionable.

The terms on which fine art auctioneers take possession of clients' goods are characteristically ambitious in the rights that they purport to exact in favour of the auctioneer. They will often deny the consignor the right to withdraw the work without paying commission, will require the consignor to pay the normal commission rate if the auctioneer is obliged to withdraw the work of its own initiative,⁵⁵⁰ and will impose a lien or other possessory security to reinforce these and other charges. The taking of possession of goods on such terms, the exercise and enjoyment of the rights thus purportedly conferred, and the eventual re-transfer of the goods and correlative remission of those rights back to the consignor when the goods fail to sell, might collectively⁵⁵¹ be thought to amount to a sufficient dealing or disposition to interfere with the true owner's right of possession and thus to constitute conversion. In rejecting arguments to that effect and

⁵⁴⁸ See fn.549 below.

⁵⁴⁹ Notably *Cochrane v Rymill* (1879) 40 LT 744; *National Mercantile Bank Ltd v Rymill* (1881) 44 LT 767; *Barker v Furlong* [1891] 2 Ch. 172; *Consolidated Co Ltd v Curtis & Son* [1892] 1 Q.B. 495; *RH Willis & Son v British Car Auctions Ltd* [1978] 2 All E.R. 392 CA.

⁵⁵⁰ For example, as a result of some concern about the provenance or authenticity of the work.

⁵⁵¹ In *Douglas Valley Finance Co Ltd v S Hughes (Hirers) Ltd* [1966] 3 All E.R. 214 at 218, where unauthorised acts were performed in series over a period, McNair J. recognised that a programme of unauthorised dealing may reach a point where the usurpation of rights exclusive to the person entitled to possession shades into conversion: "In attempting to apply this law to the facts of this case, it seems to me to be right to take the acts not in isolation but to consider whether the acts as a whole constitute a complex of action which amounts to a wrongful assumption of ownership by the defendants and a denial of the plaintiff's right." This cumulative approach is reflected in the decision of the House of Lords in *Kuwait Airways Corp v Iraqi Airways Co*, above, para.1-091, fn.512. Lord Nicholls of Birkenhead, for the majority, held (at paras.43 and 44) that the Iraqi Airways Co committed conversion of all the claimant's aircraft by being in possession and control of them, insuring some of them, over-painting some in its livery, flying some and applying for registration and airworthiness certificates in respect of some of them. Lord Steyn (at para.121), approving the approach of the Court of Appeal, held that: "It was realistic to consider the cumulative effect of the evidence concerning all 10 aircraft rather than to concentrate on the conduct in respect of each aircraft separately. It matters not how far the policy was implemented in respect of particular aircraft. The overall picture left no doubt in my mind that IAC had planned and initiated a process of incorporating the 10 aircraft in their fleet." (emphasis added). If a cumulative and impressionistic approach is justified in relation to the treatment of multiple objects in a set it must also be justified in relation to a sequence of events operating on a single object.

in devising what appears to be an auctioneer-specific principle of immunity, the Court of Appeal may have been motivated by distaste for the strict liability that normally applies in claims for conversion. Tuckey L.J. said that the outcome in *Marcq* was:

"... I think a just conclusion, although I realise it may be dangerous to test issues of strict liability in this way. Nevertheless I think it would be unduly harsh if auctioneers were to be held liable in circumstances such as these."⁵⁵²

1-095 It is rare for a judge to defend a decision on liability for non-malicious conversion by appealing to the justice of the outcome.⁵⁵³ In *Kuwait Airways Corp v Iraqi Airways Co (Nos 5 and 6)*⁵⁵⁴ Lord Nicholls commented thus on the prospect of judicial mitigation of strict liability in conversion:

"Whether those who act innocently should also be liable to make good the plaintiff's losses is a different matter. A radical re-appraisal of the tort of conversion along these lines was not pursued on these appeals. So I shall say nothing more about it."⁵⁵⁵

VI. ENFORCEMENT: PSEUDO-CONTRACTUAL ASPECTS OF NON-CONTRACTUAL BAILMENTS

1-096 The possibility that a non-contractual bailee may be guilty of deviation inevitably raises questions as to whether the non-contractual bailment is not more closely akin to a contractual relationship than to a scheme of obligation in tort. Certainly this observation may be sustained to a large degree in the case of the ordinary gratuitous bailment, because despite the lack of consideration there is an obvious consensus or agreement between the parties; and in fact the courts have been willing on occasions to adopt basic contractual principles in order to establish the obligations of the parties to such a bailment. There are, as we observe elsewhere, suggestions that the rules of agency⁵⁵⁶ and illegality⁵⁵⁷ may apply, *mutatis mutandis*, to gratuitous bailments as they do to bailments arising by way of contract; and it seems likely that similar rules as to duress, mistake, misrepresentation and mental capacity would be applied if and when the occasion arose. Moreover, there is considerable authority for the view that superadded promises on the part of a gratuitous bailee (for example, to assume a greater liability for the goods than would be imposed at common law) are enforceable in much the same way as contractual promises, despite the absence of consideration.⁵⁵⁸

⁵⁵² [2004] Q.B. 286 at 302, para.24.

⁵⁵³ Cf. the injustice inflicted by strict liability in conversion on the innocent servant in *Stephens v Elwall* (1815) 4 M. & S. 259; 105 E.R. 830; and see Hudson (2005) 10 *Art Antiquity and Law* 201 at p.204 note 18 and p.212.

⁵⁵⁴ [2002] 1 A.C. 883, [2002] UKHL 19, at para.79.

⁵⁵⁵ In a later passage (para.80) Lord Nicholls refers to statutory amelioration of the principle of strict liability but not to common law amelioration, concluding that: "in general the principle endures". At no point in *Kuwait v Iraq* did any member of the House of Lords, despite extensive analysis of the principles of conversion, endorse Blackburn J.'s special principle of immunity, though Lord Nicholls does refer to a different passage in the judgment of Blackburn J. about the hardship inflicted by strict liability.

⁵⁵⁶ *Chapman v Robinson and Ferguson* (1969) 71 W.W.R. 515; *Helson v McKenzies (Cuba St) Ltd* [1950] N.Z.L.R. 878.

⁵⁵⁷ *Walker v Watson* [1974] 2 N.Z.L.R. 175 at 180.

⁵⁵⁸ Below, paras.10-034 et seq., 11-014 et seq.

The equation is harder to make in the case of an extended bailment relation, because, although both parties may have consented to such a relation, there will generally be no agreement or communication between them. But in at least one respect sub-bailments are closer to contract than gratuitous bailments, because the law allows the head bailor to "borrow" any consideration paid by the intermediate bailee to the sub-bailee in order to extract from that sub-bailee the duties of a bailee for reward.⁵⁵⁹ We argue in the ensuing pages that certain obligations akin to obligations in contract may legitimately be imposed between such parties notwithstanding the lack of any contractual relation⁵⁶⁰; in fact, this seems already to have occurred.⁵⁶¹ The liability of a non-contractual bailee for his servants' conversions, the prohibition upon his denial of the bailor's title, the operation in his favour of non-contractual exclusion clauses and even his peculiar burden of proof, may all represent originally contractual obligations which have been applied by analogy to bailments that are independent of contract. It may therefore be possible to argue (as did Cullen in 1926) that the source of the duties and obligations in bailment is "contractual, express, implied or constructive".⁵⁶² Certainly many aspects of the liability of a gratuitous or non-consensual bailee are more closely akin to liability in contract than to anything else.

But rather than draw upon an expanded conception of contract for the conceptual basis of bailment, it seems preferable to regard bailment as something complete and *sui generis*, and the differences we have elicited appear to substantiate this conclusion.⁵⁶³ Bailment, in its entirety, is neither a synonym, nor a derivative, nor a diminutive of any other juristic image, but a personality unto itself. It may be formed or enforced without recourse to contract, and in a manner that is not wholly explicable by its central element, possession; for there are many cases in which a person may be in possession of another's chattel and yet not be a bailee. It has elements akin to the law of real property⁵⁶⁴ but these again are not a complete theorisation of the modern relation of bailment. The relationship is independent and unique.

VII. THE NATURE OF ACTIONS IN BAILMENT

1-097 It emerges from the foregoing analysis that duties arise under a bailment in two principal ways: by implication of law, as a result of the possessory relationship, or by virtue of an agreement between the parties. When the agreement is simultaneously a contract, there will be a contractual right of action to enforce any obligations that the parties have super-added to those owed at common law. Accordingly, if a bailee by contract undertakes to assume a strict liability for the goods, or to store them by a particular method, an action will lie in contract for breach of that promise. But if such a promise is enforceable against even a non-contractual bailee (such as a mandatary or unpaid custodian⁵⁶⁵) it would seem to follow that promissory obligations undertaken pursuant to any form of bailment are not

⁵⁵⁹ *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716.

⁵⁶⁰ See especially Ch.23.

⁵⁶¹ *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] Q.B. 1270.

⁵⁶² "Definition of a Bailment" (1926) 11 St Louis L.R. 257 at 265.

⁵⁶³ *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86 at 90 per Otton L.J.; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at paras.48(h) and (i) respectively per Lord Judge C.J.

⁵⁶⁴ Below, para.1-106 et seq.

⁵⁶⁵ For example, *Treffitz & Sons Ltd v Canelli* (1872) L.R. 4 PC 277.

exclusively contractual in character. Contract, under an executed bailment, becomes an accessory remedy, because the promise could have been enforced without it. The central or primary remedy becomes an action for breach of bailment.⁵⁶⁶

The independence of bailment as a source of obligation can be alternatively argued by reference to the bailee's duties at common law. The most obvious example is the duty of care. When the bailment is contractual, the bailor who complains of a breach of this duty may sue in contract (for breach of the promise to redeliver the chattel in the condition in which it was bailed) or in tort (for negligence or, in jurisdictions where this has not been abolished, for detainee).⁵⁶⁷ Generally, there is no rule dictating which cause of action the bailor shall adopt, and he may elect between them; to deny him the power of choice would, as Winfield once observed, be to allow the plaintiff to suffer and the defendant to benefit from the fact that the defendant has committed two wrongs instead of one.⁵⁶⁸ Admittedly, there was at one time doubt as to whether the plaintiff in a non-bailment case, who occupied a contractual relationship with the defendant, could frame his action alternatively as an action in tort.⁵⁶⁹ Modern authority suggests clearly, however, that he may⁵⁷⁰:

⁵⁶⁶ *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86 at 90 per Otton L.J.; and see *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at paras.48(h) and (i) respectively per Lord Judge C.J.

⁵⁶⁷ *Paterson v Miller* [1923] V.L.R. 36; *Tozer Kemsley and Millbourn (Australasia) Pty Ltd v Collier's Interstate Transport Service Pty Ltd* (1956) 94 C.L.R. 384; *John F Goulding v Victorian Rys Commrs* (1932) 48 C.L.R. 157; *The Coast Prince* [1967] 2 Lloyd's Rep. 290. As to the separate quality of the promise to redeliver, see further below, para.14-052 et seq.; *Palmer* (1978) 41 M.L.R. 629. Cf. *Steljes v Ingram* (1903) 19 T.L.R. 534 at 535; *Thomas v High* (1960) 60 S.R. (NSW) 401 at 406; *American Express Corp v British Airways Board* [1983] 1 All E.R. 557.

⁵⁶⁸ Op. cit., pp.79 et seq.

⁵⁶⁹ *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 HL; *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch. 384. For earlier authorities see, e.g., *Steljes v Ingram* (1903) 19 T.L.R. 534 (action against architect held to be an action in contract for the purposes of the County Courts Act 1888); *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 Q.B. 197 (action against architect held to be an action in contract for the purposes of the Limitation Act 1939); cf. *McConnell v Lynch-Robinson* [1957] N.I. 70 (action against architect assumed to be an action in tort for the purposes of the law as to contribution); *Jarvis v Moy Davies & Co* [1936] 1 K.B. 399 (action against stockbroker held to be an action in contract for the purposes of the County Courts Act 1919).

⁵⁷⁰ For example, *Henderson v Merrett Syndicates* (above); *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch. 384; *MacPherson and Kelley v Kevin J Prunty & Associates* [1983] V.R. 573 (overruling *Belous v Willets* [1970] V.R. 45); *Aluminium Products (Qld) Pty Ltd v Hill* [1981] Qd. R. 33; *Rowe v Turner Hopkins and Partners* [1980] 2 N.Z.L.R. 550 (solicitors); *Central Trust Co v Rafuse* (1986) 31 D.L.R. (4th) 481 (barristers and solicitors); *Simonius Vischer & Co v Holt and Thompson* [1979] 2 N.S.W.L.R. 322; *Walker v Hungerford's* (1987) 44 S.A.S.R. 532 (accountants); *Brickhill v Cooke* [1984] 3 N.S.W.L.R. 396 (engineer); *Port v New Zealand Dairy Board* [1982] 2 N.Z.L.R. 282 (stud farm). See further *Forsikringsaktieselskapet Vesta v Butcher* [1988] 2 All E.R. 43 CA, affirmed on a different point [1989] 1 All E.R. 402 HL; *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 40 D.L.R. (4th) 385; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, relying (*inter alia*) upon *Boorman v Brown* (1842) 3 Q.B. 511; 112 E.R. 1296; *H Parsons (Livestock) Ltd v Utley Ingham & Co Ltd* [1978] Q.B. 791 at 802 per Lord Denning M.R.; *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 Q.B. 88 at 108; *Govett v Radnidge* (1802) 3 East 62; 102 E.R. 520; *Fish v Kapur* [1948] 2 All E.R. 176; *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 1285; *Jackson v Mayfair Window Cleaning Co* [1952] 1 All E.R. 215; *Anderson v Rhodes* [1967] 2 All E.R. 850; *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57; *McInerney v Lloyd's Bank Ltd* [1974] 1 Lloyd's Rep. 246; *Poulton* (1966) 82 L.Q.R. 346; *Fridman* (1977) 93 L.Q.R. 422; Winfield, op. cit., Ch.4. The statement by Scrutton L.J. in *Hall v Brooklands Auto Racing Club* [1933] 1 K.B. 205 at 213, that, "when the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort" (applied by the CA of the Sup Ct of New South Wales in *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 N.S.W.L.R. 192) must be taken to be confined, as Denning L.J. observed in the *John Warwick* case [1953] 1 W.L.R. 1285 at 1294, to cases where the plaintiff has plainly contracted to exempt the defendant from liability in tort. See generally below, Ch.38, but cf. below.

and, in any event the main authority to the contrary had always recognised an exception for cases of bailment.⁵⁷¹

The main reason for this exception is that the bailee's liability is not founded solely upon contract but arises from his voluntary possession of the chattel.⁵⁷² This also helps to explain why a bailee may be sued even after his deviation has automatically discharged the contract pursuant to which the goods were bailed.⁵⁷³ The bailment survives the contract and he may be sued thereupon.⁵⁷⁴

1-098 For some purposes, admittedly, it is essential to divide actions exclusively into those in contract and those in tort, and to allocate an action for breach of bailment to either of these exhaustive categories. This necessity arises when the legislature lays down imperative and distinctive rules for contract and tort and overlooks the possibility that an action in bailment may be independent of either.⁵⁷⁵ In such a case the courts will ascertain whether the plaintiff could have maintained the action without relying on the contract, or whether the contract alone produced the duty that is now alleged to be broken. If the former is the case, the action will be characterised as one in tort. The process is an artificial one, which has little relevance to the legal quality of bailment in more general contexts. Thus it has been held that an action for breach of the duty of care owed by a bailee for mutual advantage is an action in tort for the purposes of the Limitation Act 1939.⁵⁷⁶

⁵⁷¹ *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 Q.B. 197 at 204-206; and see Poulton (1966) 82 L.Q.R. 346 at 353-360; Winfield, op. cit., p.63: "Lawyers were thoroughly familiar with negligence as one mode of bungling a contract or a bailment long before it became an independent tort. Nor has it ever ceased to retain this earlier signification, though it has acquired the later one. Here then was one fruitful source of coincidence of contract with liability in tort, and it shows no sign of exhaustion at the present day." The carriers' cases are the most obvious examples of a bailor's ability to proceed against a contractual bailee in tort. But note that, where there is a written agreement which sets out the terms of the parties' engagement and appears, on its face, to have been intended to act as a definitive catalogue of their obligations, the courts will be reluctant to allow one party to outflank those obligations by asserting a wider liability in tort for negligence: *Tai Hing Cotton Mill Ltd v Liu Chong-Hing Bank* [1986] A.C. 80 PC; *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1988] 2 All E.R. 971 CA. Cf. *Henderson v Merrett Syndicates* [1995] 2 A.C. 145 HL.

⁵⁷² *Turner v Stallibrass* [1898] 1 Q.B. 56.

⁵⁷³ Above, para.1-029.

⁵⁷⁴ As to the continuation of the bailee's responsibilities, see generally below Ch.13.

⁵⁷⁵ Several authorities recognise that particular statutory procedures for the recovery of goods may be circumvented by bringing a common law action in bailment or in detinue: e.g. *Leicester & Co v Cherryman* [1907] 2 K.B. 101 at 102-103 per Ridley J. (Pawnbrokers' Acts; but cf. *Legrand Jewellery (Mfg) Co Ltd v Wo Fung Pawnshop* [1988] 2 H.K.L.R. 326); *Davis v Hampshire Police Authority* [1978] C.L.Y. 3024 (Police (Property) Act 1897). Cf., as to circumvention of the Post Office Act 1969, *Harold Stephen & Co v Post Office* [1977] 1 W.L.R. 1172 at 1177-1178 and 1179-1180 CA; *American Express Corp v British Airways Board* [1983] 1 All E.R. 557, noted All E.R. Rev 37-38, and see further Samuels (1983) 99 L.Q.R. 524, discussing *Universe Tankships Inc of Monrovia v ITF, The Universe Sentinel* [1983] 1 A.C. 366 HL. See further, recognising the possibility of circumventing the international air carriage regime by the bringing of claims at common law for breach of bailment, *Gatewhite Ltd v Iberia Lineas Aereas de España SA* [1990] 1 Q.B. 326; *Tasman Pulp and Paper Co Ltd v Brambles JB O'Loughlen Ltd* [1981] 2 N.Z.L.R. 225; *Western Digital Corp v British Airways plc* [2001] 1 Q.B. 733 at p.752, para.44, 768-770, para.81(II) per Mance L.J., who was not persuaded by a dictum in *Sidhu v British Airways plc* [1997] 1 All E.R. 193 at 210 per Lord Hope of Craighead; *East West Corp v DKBS AF 1912 A/S* [2003] EWCA Civ 83, [2003] Q.B. 1509, at pp.1534-1535, para.34, 35, per Mance L.J.; but cf. *Emery Air Freight Corp v Nerine Nurseries Ltd* [1997] 3 N.Z.L.R. 723, NZCA, dealing with a claim by a consignor, and following by analogy *Sidhu v British Airways plc* [1997] 1 All E.R. 193 in holding that the consignor could not sidestep the Warsaw Convention by bringing a claim at common law in bailment; *Bart v British West Indian Airways Ltd* [1967] 1 Lloyd's Rep. 239.

⁵⁷⁶ *Chesworth v Farrar* [1967] 1 Q.B. 407; cf. *John F Goulding Pty Ltd v Victorian Rys Commrs* (1932) 48 C.L.R. 157.

and the County Courts Act 1888.⁵⁷⁷ No doubt the same characterisation would be applied *a fortiori* to an action against a gratuitous bailee:

"I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the result of the cases appears to be that, if the plaintiff can maintain his action by shewing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule. A distinction has been drawn between acts of misfeasance and non-feasance which has given rise to some difficulty; but it seems to me that, whether the matter complained of is one of misfeasance or non-feasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between bailor and bailee. If it is, then the plaintiff is not driven to rely on a contract within the meaning of the rule on the subject of costs. But if it is not, then the plaintiff must rely on a contract in order to shew a course of action, and the action is therefore one founded on contract."⁵⁷⁸

Conversely, it has been held that an action by the bailor of a car against a car-park operator for loss caused by the operator's failure to safeguard the vehicle with reasonable care is an action founded upon a contract for the supply of services within the meaning of the Victorian Small Claims Tribunal Act 1973⁵⁷⁹; and that an action against a bailee for money had and received, although based upon the bailee's conversion of the chattel, is quasi-contractual and not an action in tort for the purposes of the Limitation Act.⁵⁸⁰ Clearly the classification of an action for breach of bailment as contractual or tortious depends largely upon the purpose of the statute dictating the classification and upon the context in which the classification is to be made. The action may be an action in tort for the purposes of one statutory rule and not for the purposes of another.

The fact that such a classification must occasionally be made because the legislature has divided actions exclusively into those in contract or tort is not, however, conclusive

⁵⁷⁷ *Turner v Stallibrass* [1898] 1 Q.B. 56; see also *Bryant v Herbert* (1878) 3 C.P.D. 389; *Du Pasquier v Cadbury, Jones & Co Ltd* [1903] 1 K.B. 104; *Taitan v GW Ry* (1860) 2 El. & El. 844; 121 E.R. 315; *Pontifex v Mid Ry* (1877) 3 Q.B.D. 23. But cf. *Bellinger v Autoland Pty Ltd* [1962] V.R. 514; above para.1-071, fn.436.

⁵⁷⁸ *Turner v Stallibrass* [1898] 1 Q.B. 56 at 59-60 per Collins L.J. The explanation of the distinction which has probably received the greatest acceptance among modern authority is that of Greer L.J. in *Jarvis v Moy Davies & Co* [1936] 1 K.B. 399 at 405: "where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract." This was approved in *Chesworth v Farrar* [1967] 1 Q.B. 407 at 414, and in *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 Q.B. 197 at 204; see also *Forsikringsaktieselskapet Vesta v Butcher (No.1)* [1988] 2 All E.R. 43 CA, affirmed on another point [1989] 1 All E.R. 402 HL.

⁵⁷⁹ *Walsh v Palladium Car Park Pty Ltd* [1975] V.R. 949.

⁵⁸⁰ *Chesworth v Farrar* [1967] 1 Q.B. 407 at 416-418. See further as to this decision para.40-006. Cf. *Mears v Sayers* (1974) 41 D.L.R. (3d) 424, as to the assignment of the bailor's rights of action.

evidence against the independent character of an action for breach of bailment. As Winfield observed:

"... 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."⁵⁸¹

We have already seen that actions for breach of bailment may be entirely distinguishable from actions in contract or tort. It is submitted that these distinctions are not the fragmentary relics of a moribund form of action but are evidence of a coherent and unitary source of modern obligation. Thus, even when an action in bailment runs parallel to an action in contract or tort, its independent character should be recognised, and its content should be worked out without undue regard to any similarity with other forms of action. It would follow that a breach of the contractual bailee's duty of care could give rise to actions in contract, tort or bailment,⁵⁸² and that a breach of the non-contractual bailee's duty could give rise to an action in bailment as well as a simple action in tort. We have already seen that the two are not identical for all purposes. Even when their operation is substantially similar, it does not follow that they can be universally equated.

1-099 If, even in this concurrent sphere, the action for breach of bailment retains its separate identity, it becomes necessary to explore that identity for the purpose of rules that normally operate on a distinction between contract and tort. To some extent, this inquiry necessitates an assessment as to whether, in a given context, the action against a bailee is more akin to a contractual action than to a tortious action, or vice versa. It also involves an examination of some of the differences between contract and tort.

We explore in later individual chapters the classification of bailment claims for purposes of the common law of damages and for purposes of the statutory rules that govern limitation periods and questions about the position of bailment in the conflict of laws. A few further examples of the problems of classification are appended.

(A) Contributory Negligence and *volenti non fit injuria*⁵⁸³

1-100 Until fairly recently, the balance of authority suggested that contributory negligence and *volenti non fit injuria* were not defences to an action for breach of

⁵⁸¹ Op. cit., p.101.

⁵⁸² *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86 at 90 per Otton L.J.; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at paras.48(h) and (i) respectively per Lord Judge C.J. Modern but allusive recognition of this possibility is afforded by the CA of the Sup Ct of New South Wales in *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 N.S.W.L.R. 192. Cf. *Harold Stephen & Co Ltd v Post Office* [1977] 1 W.L.R. 1172 where the Court of Appeal left open the question whether s.29(1) of the Post Office Act 1969 could be circumvented by bringing an action in bailment as opposed to one in "tort"; and *American Express Corp v British Airways Board* [1983] 1 All E.R. 557 where Lloyd J., while appearing to accept in principle the independent nature of actions in bailment, denied that such circumvention was possible on the wording of the particular statute. And see further *Leicester & Co v Cherryman* [1907] 2 K.B. 101 at 102-103 per Ridley J.; *Davis v Hampshire Police Authority* [1978] C.L.Y. 3024; cf. *Legrand Jewellery (Mfg) Co Ltd v Wo Fung Pawnshop* [1988] 2 H.K.L.R. 326.

⁵⁸³ Law Commission, Working Paper No.114, "Contributory Negligence as a Defence in Contract" (1990); Palmer and Davies (1980) 29 I.C.L.Q. 145.

contract.⁵⁸⁴ In cases where a bailor sued for breach of the bailee's duty of reasonable care, some courts (relying on the above principle) drew a distinction between gratuitous and contractual bailments. For example, it was held in New Zealand that an action against a gratuitous borrower was an action for negligence and that the specified defences could accordingly apply⁵⁸⁵; whereas it was held in Victoria that an action against a hirer for failure to take reasonable care of the chattel hired was an action in contract and that contributory negligence is no defence.⁵⁸⁶ On the other hand, dicta elsewhere suggested that both defences could apply to bailments for reward.⁵⁸⁷

In recent years, the general contractual position has been substantially clarified and refined. The defence of contributory negligence is available in an action for breach of contract, provided that the defendant's contractual liability "is the same as his liability in the tort of negligence independently of the existence of any contract".⁵⁸⁸ It is therefore necessary that the acts or omissions of the defendant that constitute the breach of contract could also have given rise, independently of the contract, to a liability in tort.⁵⁸⁹ On the other hand, the defence will continue to be unavailable to defendants who are sued for breach of some strict contractual obligation (whether that breach be committed "negligently" or otherwise); or to defendants who are sued for breach of some contractual duty of care which is incapable of existing separately as an independent tort.

Clearly, an approach of this nature reduces the importance of discovering whether, for purposes of contributory negligence, the bailor's action against the bailee lies in contract or in tort. The principal obligation that a bailee owes is his or her duty of reasonable care; in cases of bailment for reward, this duty appears capable of being sued upon in contract, in tort, or in bailment.⁵⁹⁰ A claim grounded on an alleged breach of the duty of care would therefore seem to attract the defence, irrespective of its literal form. But different considerations will apply when the duty that the bailee is alleged to have broken is strict.⁵⁹¹

⁵⁸⁴ *Becker v Medd* (1897) 13 T.L.R. 313; *Vaile Bros v Hobson Ltd* (1933) 149 L.T. 283 at 284; *Quinn v Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370; *Astley v Austrust Ltd* (1997) 197 C.L.R. 1; *Belous v Willets* [1970] V.R. 45; *AS James Pty Ltd v CB Duncan* [1970] V.R. 705; *Harper v Ashton's Circus Pty Ltd* [1972] 2 N.S.W.L.R. 395; *Southland Harbour Board v Vella* [1974] 1 N.Z.L.R. 526; *Walker v Watson* [1974] 2 N.Z.L.R. 175; but cf. *Sayers v Harlow UDC* [1958] 1 W.L.R. 623; *Grein v Imperial Airways* [1937] 1 K.B. 50; *De Meza v Apple* [1974] 1 Lloyd's Rep. 508; *Artingstoll v Hewens Garages Ltd* [1973] R.T.R. 197 at 201; *Basildon DC v JE Lesser (Properties) Ltd* [1985] Q.B. 839; *The Shinjitsu Maru No.5* [1985] 3 All E.R. 442. Tasmanian authority held contributory negligence to be a defence to an action for negligent breach of contract: see *Queen's Bridge Motors Pty Ltd v Edwards* [1964] Tas. S.R. 93; *Smith v Buckley* [1965] Tas. S.R. 210 per Crisp J.; *W & G Genders Pty Ltd v Noel Searle (Tasmania) Pty Ltd* [1977] Tas. S.R. 132 per Crawford J. which contains a useful survey of the authorities. Cf. *Wilton v Commonwealth Trading Bank of Australia* [1973] 2 N.S.W.L.R. 644 where Samuels J., considering whether contributory negligence applied at common law to an action for conversion, enquired whether this was ever a total defence before the relevant apportionment legislation was passed.

⁵⁸⁵ *Walker v Watson* [1974] 2 N.Z.L.R. 175; *Palmer* (1975) 24 I.C.L.Q. 565; see also *Thomas v High* (1960) 60 S.R. (NSW) 401.

⁵⁸⁶ *AS James Pty Ltd v C B Duncan* [1970] V.R. 705 at 719 et seq. Likewise *Aseltine v McAnally* [1950] O.W.N. 229, and see also *Coupe Co Ltd v Maddick* [1891] 2 Q.B. 413 at 415-416; *Thomas v High* (1960) 60 S.R. (NSW) 401 at 406.

⁵⁸⁷ For example, *Saunders (Mayfair) Furs Ltd v Chas Wm Davies Ltd* [1966] 1 Lloyd's Rep. 78 at 83; *Minichiello v Devonshire Hotel* (1967) Ltd (1976) 66 D.L.R. (3d) 619 at 625-262; but cf. *Brabant & Co v King* [1895] A.C. 632 at 641; *Talley v GW Ry* (1870) L.R. 6 C.P. 44 at 52; *Vosper v GW Ry* [1928] 1 K.B. 340.

⁵⁸⁸ *Forsikringsaktieselskapet Vesta v Butcher* [1988] 2 All E.R. 43 at 47-48 per O'Connor L.J. CA, affirmed on another point [1989] 1 All E.R. 402 HL. See further *Rowe v Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550, and cf. *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 11 E.G. 71 CA. This solution was proposed by academic commentators in 1980: see Palmer and Davies (1980) 29 I.C.L.Q. 415 at 443 et seq.

⁵⁸⁹ *Barclay's Bank plc v Fairclough Building Ltd* [1995] Q.B. 214 CA.

⁵⁹⁰ *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86 at 90 per Otton L.J.; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at paras.48(h) and (i) respectively per Lord Judge C.J.

⁵⁹¹ Note that, in the particular case of conversion, there is statutory authority denying the availability of the defence: *Torts (Interference with Goods) Act 1977* s.11(3).

1-101 One's principal impression, however, when considering whether contributory negligence and *volenti* are available in separate actions for breach of bailment, is that those defences will generally be irrelevant. The known capacity of a bailee can often be taken to qualify his duty of care, so that a case like *Walker v Watson*,⁵⁹² could equally have been decided on the ground that the bailor was entitled to exact from the drunken bailee only such a degree of care as he knew to be within her diminished capability.⁵⁹³ An approach of this kind effectively negates the significance of *volenti* to actions in bailment, and it could be further argued that contributory negligence is likewise immaterial in this context: the bailor's negligence operates as a qualification of the bailee's duty of care, and the question becomes a simple one as to whether that qualified duty has been satisfied.⁵⁹⁴ But in peripheral cases a power of apportionment may be useful and it may be equitable to reduce the quantum of the bailor's damages according to the part he has played in the bailee's acknowledged breach of duty.⁵⁹⁵ A tentative example may be drawn from a Canadian case,⁵⁹⁶ where the operators of a car-wash wrongfully left the bailor's car in the street when they had performed their work upon it. They took care not to leave the ignition key in the car but were unaware that the bailor had left a spare key in the glove compartment. The car was stolen and the bailees were held liable in full for its loss; but it could at least be argued that the bailor had in some degree contributed to that loss. In any event, it seems that the independent action for breach of bailment may provide one method of averting the often unfair principle (which may survive in some Commonwealth jurisdictions) that *volenti* and contributory negligence are not defences to actions in contract, at least when the plaintiff founds his case upon a central duty of care. This, like the ensuing examples, represents an area in which the character of bailment has not been sufficiently explored. Such exploration can only be made when cases arise in which its character is fully argued.

(B) Rights of Contribution

1-102 A person who is liable in tort for damage may recover contribution from any other tortfeasor who would, if sued, have been liable for the same damage; and this right applies whether the party from whom contribution is claimed is a joint tortfeasor or not. This result was originally achieved by s.6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935, which abrogated the rule in *Merryweather v Nixan*.⁵⁹⁷ This provision did not, however, apply to contracting parties, so that a defendant sued for a breach of contract could not claim contribution from another contracting party unless their obligation arose under a joint contract.⁵⁹⁸ This limitation was clearly capable of

⁵⁹² [1974] 2 N.Z.L.R. 175.

⁵⁹³ *Ibid.*, at 180; and see below, para.14-047.

⁵⁹⁴ Or, whether the plaintiff has fulfilled his duty to mitigate.

⁵⁹⁵ In *Bowden v Lo* [1998] NSWSC 216, Hodgson C.J. in Eq. reduced by 75% the damages awarded against former landlords who had failed to return chattels that the claimant tenant had left on the premises. The bailment does not appear to have been contractual or even consensual: the landlords' reward appears to have consisted of the prospect that the detained chattels might be helpful in satisfying their demand for unpaid rent. Hodgson C.J. in Eq., approving the text, thought that the claimant's contributory negligence lay in his default in paying rent and in his utter failure to act to remove or protect his valuable goods. Cf. the decision of Clarke J. in *Grace v Leslie & Godwin Financial Services Ltd* [1995] LRLR 472, *The Times* 16 May 1995 which, though not a bailment case, applied principles of bailment by way of analogy; below, para.1-122. The claimant's damages were reduced by 43% for contributory negligence.

⁵⁹⁶ *Edelson v Musty's Service Station & Garage* [1956] O.W.N. 848.

⁵⁹⁷ (1799) 8 Term. Rep. 186; 101 E.R. 1337.

⁵⁹⁸ *McConnell v Lynch-Robinson* [1957] N.I. 70; and see further *Dominion Chain Co v Eastern Construction Co Ltd* (1976) 1 C.P.C. 13.

operating inequitably, and has now been abolished in England,⁵⁹⁹ though it survives in some other common law jurisdictions.⁶⁰⁰ In the peripheral area of the bailees' liability for the acts of servants, independent contractors and secondary bailees generally, courts appear formerly to have been untroubled by the fact that the contributor's liability may not in fact be tortious and therefore incapable of engendering a duty to contribute.⁶⁰¹ This seems reasonable when the second tortfeasor's liability is akin, e.g., to ordinary principles of vicarious liability; but it may prove harder to achieve when the only liability which he could have owed the victim was one arising under some promissory, non-contractual obligation based on the implied terms of the extended bailment. Moreover, an original bailee may be liable either in contract or in tort, and if sued in the former might again appear precluded from enforcing a right of contribution under legislation equivalent to the 1935 Act. It is submitted that an action against a primary bailee should be classified so far as possible as an action in tort for this purpose when it relates to the fundamental duty to safeguard the goods; but again the difficulty may be that his liability is contractual and does not correspond with any established tort at all. The only solution would then be to argue that the duty in question is not essentially contractual because it may be enforced without consideration; but this alone may not convince the court that the damage is suffered "as a result of a tort". Of course, many of the foregoing problems are academic because the first bailee may have a contractual (or even a non-contractual) right of indemnity against the second bailee,⁶⁰² but this conclusion may not always follow. It is to be hoped that some consideration of the special problems of bailment will be reflected in any reform of the law in this area.

(C) Claims Against the Crown

1-103 At common law the Crown could not be sued in tort and could be sued in contract only by petition of right. Statute has now removed both of these disabilities,⁶⁰³ and the distinction between contract and tort has declined in significance in this context. It seems that an action against the Crown for breach of its duty of care as a bailee was normally regarded as an action in tort for this purpose.⁶⁰⁴ In *Brabant & Co v King*⁶⁰⁵ this liability was extended to acts of non-feasance when:

"... the parties charged with non-feasance are under obligation to an individual member of the public to perform the duty which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance".

It seems, however, that a similar liability for negligence by omission might be exacted from the Crown in those areas (admittedly rare) in which it is a gratuitous bailee, or a sub-bailee for reward.

⁵⁹⁹ Civil Liability (Contribution) Act 1978; see Law Commission Report No.79, Contribution, (1977).

⁶⁰⁰ Trindade, Cane and Lunney, *Law of Torts in Australia*, 4th edn (2007) 812.

⁶⁰¹ See, e.g., *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep. 25 at 35; but cf. *Arcweld Constructions Pty Ltd v Smith* (Unreported, 1968, Victoria Sup. Ct); below, para.23-065.

⁶⁰² Cf. *Everett's Blinds Ltd v Thomas Ballinger Ltd* [1965] N.Z.L.R. 266.

⁶⁰³ Crown Proceedings Act 1947 ss.1, 2. Note that s.10 of this Act has been repealed by the Crown Proceedings (Armed Forces) Act 1987.

⁶⁰⁴ But it appears that in mixed cases of contract and tort a fiat would generally be granted enabling the plaintiff to bring a petition of right: Halsbury, *Statutes*, Vol.8, p.846. Cf. the Canadian decisions in *Long v The King* (1922) 63 D.L.R. 134; *Kaufman Metal Co v The King* [1951] 1 D.L.R. 801; *Massein v The King* [1935] 1 D.L.R. 701; *Corse v The Queen* (1892) 3 Ex. C.R. 13.

⁶⁰⁵ [1895] A.C. 632.

For many reasons, it may still be preferable for a bailor to frame his action in contract rather than in tort, even under the extended liability of the Crown Proceedings Act 1947. The classes of employee for whom the Crown may be vicariously liable⁶⁰⁶ and the requirement that the servant himself must be liable in tort to the claimant⁶⁰⁷ severely limit the utility of the Act to plaintiffs in tort. Thus it seems that the Crown might not be liable in tort for the negligence of a borrowed servant, leading to the loss of the bailor's goods by theft. In this and in other potential situations it may be advisable to proceed in contract; and if the bailment is contractual in character such an action should be allowed as a means of enforcing even the fundamental duties of the bailee at common law. Where, however, the bailment is non-contractual, the bailor who sues for breach of the bailee's common law duties would seem at first sight to be limited to an action in tort, and the bailor who sues for breach of some superadded or pseudo-contractual obligation would appear to have no action at all. A possible solution to this dilemma may exist in s.2(1)(c) of the Act, which allows the plaintiff to proceed against the Crown:

"... in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of the property."

This subsection seems primarily to have been designed to impose upon the Crown the principles of occupiers' liability, and there is some difficulty in construing it as covering all of the Crown's duties as a potential non-contractual bailee. The fundamental duties of the bailment (i.e. to take reasonable care of the chattel, and to abstain from converting it) would seem to be readily enough encompassed by s.2(1)(c), which has the advantage of not being subject to the proviso as to the independent liability of any servant or agent. But extra obligations may need to satisfy two apparent conditions in order to qualify for enforcement under s.2(1)(c): first, that liability under them is liability "attaching at Common Law" within the meaning of s.2(1)(c) itself, and, secondly, that such liability qualifies as liability "in tort", as contemplated by the prefatory words to s.2(1). Although the satisfaction of these requirements may be difficult, it is submitted that a court could legitimately hold that they were satisfied for the purpose, for instance, of enforcing a proto-contractual undertaking by the Crown as an extended bailee to be liable for the conversions of its independent contractors.

1-104 In *Levy Bros v The Queen*,⁶⁰⁸ the Crown was held liable under s.3(1)(a) of the Crown Liability Act 1952 (Can) for the conversion of goods by one of its servants while acting in the course of his employment. The servant was an employee in the Customs Postal Branch and the goods were a parcel of diamonds delivered to that office pending entry and payment of customs duty. Section 3(1)(a) was equivalent to s.2(1)(a) of the English statute, which provides that the Crown is liable in respect of torts committed by its servants or agents provided (as was clearly the case in the present proceedings) the servant or agent himself would be liable. The Supreme Court of Canada left open the question whether the Crown would additionally have been liable, as a bailee, under the Canadian equivalent of s.2(1)(b) of the English Act.⁶⁰⁹ It is submitted that such a

⁶⁰⁶ Section 2(3) to 2(6).

⁶⁰⁷ Section 2(1).

⁶⁰⁸ (1961) 26 D.L.R. (2d) 760.

⁶⁰⁹ *Ibid.*, at 764. Contrast two cases where it was held that no bailment arose on the part of the Crown: *Hodgson Sumner & Co v The King* (1915) 15 Ex. C.R. 487 (Crown not a bailee of prize of war); *Zien v The Queen* (1986) 26 D.L.R. (4th) 121, especially at 125 per Pratte J. (Can. Fed. CA), reversing in part (1984) 15 D.L.R. (4th) 283 (Crown gained no possession of goods merely being examined by customs official; further, "there are decisions of long standing to the effect that goods, even where they are held in customs pending payment of duty, are not the subject of a bailment").

conclusion would have been justified, and may provide a method of enforcing against the Crown, as a non-contractual bailee, those obligations which do not qualify as giving rise to claims in tort within the meaning of s.2(1)(a).

The liability of the Post Office for the loss of or damage to goods handed to them for delivery is governed by special rules, beyond the ambit of the present work.⁶¹⁰

(D) Miscellaneous Cases

1-105 We have already noted that an action for breach of the bailee's duty of care has been characterised as an action in tort for the purposes of the Limitation Act 1939 and of the County Courts Act 1888.⁶¹¹ In *Thomas v High*,⁶¹² it was held that an action against a gratuitous bailee for the non-return of money could not (because of the absence of consideration) be classed as contractual and was essentially an action in conversion.

Moreover, this characterisation would apply on the facts of the case even though the bailor sued alternatively on a count for money had and received. On this point the decision may be contrasted with *Chesworth v Farrar*,⁶¹³ where the Court of Appeal held that an action for money had and received was not an action in tort (but in quasi-contract) for the purposes of the Limitation Act. The question of characterisation arose in *Thomas v High* because the defendant bailee claimed a stay of action. He contended that the claim was based on fraud, and should therefore be stayed until he was prosecuted for felony. The magistrate had regarded the action as a suit for breach of contract and had regarded the relationship between a bailor and gratuitous bailee as contractual. The Supreme Court *in banco* rejected this classification and remarked that the bailor's rights under such a bailment were purely rights of action in tort. A new trial was therefore ordered and the magistrate's verdict set aside, because the refusal of the defendant to return the money on demand was evidence of a conversion.

With respect, it is submitted that the court was in error in observing that a bailor's remedies under a gratuitous bailment lie exclusively in tort. An action may lie for breach of bailment in cases where the bailee's liability is incapable of being rationalised as tortious or contractual. To state that tort is the sole foundation of action upon a gratuitous bailment or (as Ferguson J. did) that the duties of a bailee for reward "arise out of contract",⁶¹⁴ is to neglect the special character of bailment and to contribute to its extinction in favour of more modern forms of action.

VIII. BAILMENT AND PROPERTY⁶¹⁵

(A) General

1-106 We have hitherto excluded from our consideration of the nature of bailment any examination of its role within the broader field of property. This is largely because our analysis has concentrated on modern judicial interpretations of the scope and content of

⁶¹⁰ Post Office Act 1969 s.30; Halsbury, *Laws of England* Re-issue, 4th edn, Vol.36(2) paras.87, 96.

⁶¹¹ Above, para.1-098.

⁶¹² (1960) 60 S.R. (NSW) 401.

⁶¹³ [1967] 1 Q.B. 407; discussed below, para.40-004 et seq.

⁶¹⁴ (1960) 60 S.R. (NSW) 401 at 406.

⁶¹⁵ Paton (1950) 23 A.L.J. 591; *Bailment in the Common Law* (1952), pp.29 et seq.