THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 07

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CONCISE HORNBOOKS

PRINCIPLES OF

Property Law

SIXTH EDITION

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THOMPSON
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PRINCIPLES OF PROPERTY LAW

Sixth Edition

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Chapter 2

BAILMENTS

Table of Sections

SUMMARY

§ 2.1 Definition of Bailment

1. Broadly speaking, a bailment is a rightful possession of goods by one who is not the true owner. The goods must be specific and distinguishable. Thus, ordinarily one can not bail fungible items such as cash or grains.

2. Generally, a bailment occurs when there is delivery of personal property by a prior possessor to a subsequent possessor for a particular purpose with an express or implied understanding that when the purpose is completed the property will be returned to the prior possessor.

3. The person who creates the bailment is called the "bailor;" the person to whom the goods are bailed is called the "bailee."

4. A bailment is frequently said to be based on a contract, expressed or implied.

a. Express bailment contracts typically arise as a result of negotiations between the bailor and bailee.

b. Implied contracts can arise when someone comes into possession of the goods of another and the law imposes an obligation upon them to return the goods to another, such as in the case of a finder.

5. The bailee must be in possession of the goods.

6. In order to have possession there must be physical control over the property and intention to exercise that control.

a. Control, for example, is an issue when goods are deposited in a safe deposit box where both the customer and the bank have keys. Some courts hold this a bailment although the bailee has neither complete control nor any way to know what is in the box. The bailee does intend, however, to control the contents whatever they are.

b. There also must be an intent to exercise control. This issue is critical in bailments of parcels or other goods containing items of which the "bailee" is unaware, and in situations where the depository attempts to prevent herself from becoming a bailee of the particular item.

§ 2.2 Distinguishing Bailment From Other Legal Relationships

1. A bailment is distinguished from other legal relationships as follows:

a. *Custody:* When the owner of goods places them in the actual physical control of another with no intent to relinquish the right, as distinct from the power of dominion over them, there is no bailment or possession but only custody. For example, if a clerk hands goods to a customer to examine, the customer has only custody. Similarly, an employee has only custody of his employer's goods.

b. *Sale:* In a sale, title passes to the purchaser; in a bailment the title remains in the bailor.

c. *Conditional Sale:* A purchaser under a conditional sales contract acquires not only possession but also beneficial interest in the goods for which he is under an obligation to pay. The conditional seller retains legal title for security only.

d. *Trust:* A trustee acquires legal title for purposes of performing her duties as trustee; a bailee has only possession. Thus, ordinarily a trustee can convey a good title to a third person whereas a bailee cannot.

e. *Lease:* A landlord-tenant relationship and not a bailment results if there is a lease of space for use by the tenant. The automobile parking lot situation results in a landlord-tenant or licensor-licensee relationship in the case of a park-and-lock operation. In this situation the owner of the car keeps the keys, along with control and constructive possession of the automobile. On the other hand, if the keys are surrendered to the attendant who assumes control of the car, there is a bailment. In a lease of personal property where the lessee

acquires possession of the goods with an obligation to return them, the lessee is a bailee of the goods.

§ 2.3 Classification of Bailments and Standard of Care

1. Although the classifications are criticized, bailments are frequently classified according to which of the parties derives the most benefit. Classification is important for the purpose of imposing liability for negligence on the bailee and assessing the standard of the bailee's care over the bailed goods. According to the classification scheme, if the bailment:

a. Is for the sole benefit of the bailor, the bailee is liable only for gross negligence and is responsible for exercising slight care over the bailed goods;

b. Is for the sole benefit of the bailee, the bailee is liable for even slight negligence and is responsible for exercising great care over the bailed goods;

c. Is for the mutual benefit of both the bailor and bailee, the bailee is liable for ordinary negligence and is responsible for exercising ordinary care over the bailed goods. Ordinary care is that care that would be exercised by a reasonably prudent person under the circumstances. The trend is for this standard in all cases.

2. The parties by contract may alter the standard of care owed by the bailee where this is not contrary to public policy. To so contract, both parties must accept the terms, and where only a sign is posted by the bailee, there must be proof that the bailor saw and accepted its terms. For example, a limitation of liability on a check or receipt for the bailed goods is valid only if the bailor read the ticket and did not object, or if a reasonable person would expect a contract under such circumstances. Some such attempts to limit liability may also be invalid on public policy grounds or by express statute.

§ 2.4 Liability for Failure to Return Goods

1. The bailee has a duty to return the goods to the bailor on demand, or if a fixed term has been set for the bailment by contract, at the expiration of that term.

2. The bailee is liable for conversion, regardless of negligence, if the bailee wrongfully refuses to return the goods or if the bailee delivers the goods to the wrong person. This is often called a "misdelivery."

3. Liability of the bailee is based on negligence if the goods are lost, stolen, destroyed, or damaged during the bailment. The

burden of proof is normally on the bailor to establish that the bailee was negligent, and if the bailor proves delivery of the goods and failure to return them, or re-delivery in a damaged condition, the bailor establishes a prima facie case. At this point, the burden of going forward with the evidence ordinarily shifts to the bailee.

§ 2.5 Rights of Bailees Against Third Parties

A bailee is entitled to possession of the bailed property or damages against third parties who wrongfully take or damage the property. The wrongdoer cannot defeat the bailee's claim by showing title in another with whom the wrongdoer has no connection. Thus, as against the subsequent wrongdoer the bailee's possessory interest in the bailed goods is essentially the equivalent of title.

§ 2.6 Rights of Bailors Against Bona Fide Purchasers

1. Ordinarily a person cannot transfer a greater title to property to a third person than the transferor has. Thus, a bailee ordinarily cannot defeat the rights of the bailor by transferring the bailed property to a third party.

2. Under certain circumstances a bailee can transfer a good title to a purchaser even though the transfer is wrongful as against the bailor. This can occur if the bailee is a dealer of the kind of goods bailed and the transferee is a bona fide purchaser for value.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 2.1 Definition of Bailment

PROBLEM 2.1: A's messenger, C, dropped a bond through a letter slot into B's office. The bond was in an envelope bearing the name of A. B's employee, who had not seen C, immediately discovered that the bond had been incorrectly delivered and was not the one ordered by B. For the purpose of returning the bond to A, B's employee immediately opened the door and called for A's messenger. X, a wrongdoer, stepped up to the door and B's employee, mistakenly believing X to be A's messenger, handed the bond to X. X absconded with the bond. A brought suit against B to recover the value of the bond, and the trial court found in A's favor. B appeals, what result?[1]

Applicable Law: A bailment is a consensual transaction entered into willingly by the bailor and the bailee. The term "involuntary bailment" is applied to those situations where property is placed under the control of a person without that

1. Cowen v. Pressprich, 117 Misc. 663, 192 N.Y.S. 242 (1922), reversed, 202 App.Div. 796, 194 N.Y.S. 926 (1922).

person's knowledge or consent. In this situation the only obligation owed by the "bailee" to the owner is that of ordinary care under the circumstances. Absolute liability in conversion for misdelivery, applicable to bailees generally, is not applicable to involuntary bailees. Thus, if an involuntary bailee acts reasonably in attempting to divest himself of possession as soon as he becomes aware of the chattel, the "bailee" is not liable to the owner if the chattel is thereafter lost, stolen, or damaged without the "bailee's" negligence. This rule applies because in involuntary bailments the bailee does not know the identity of the bailor. A similar rule applies to finders who, although exercising due care, mistakenly return the goods to the wrong person.

Answer and Analysis

B should win the appeal. In a consensual bailment, the bailee intentionally assumes possession of the bailor's chattel and is aware of the responsibilities assumed with respect to the property. Furthermore, the bailee knows the identity of the bailor. Frequently, however, a person comes into possession of a chattel without either the person's knowledge or consent. This is generally the case when a finder finds lost property. While a minority of courts deny the existence of a bailment, the great majority classify the relationship as a quasi or involuntary bailment.

The common law does not thrust the duty of caring for the goods of another on a person against his will. When someone acquires possession of another's goods involuntarily, she has no affirmative duty to care for them unless she does some act inconsistent with the proposition that she does not accept possession. For example, if the person uses the goods for her own purposes, willfully destroys them, or refuses to surrender them to the owner on demand, the person then assumes dominion and possession over them. The person also assumes the liabilities of a bailee.

Here, the bailee was put in possession of the bond without any agreement to accept it. The delivery had been a mistake. The bailee promptly discovered it and immediately attempted to return the bond to the messenger. Therefore, as an involuntary bailee there was only responsibility to exercise ordinary care in attempting to return the bond.

In a voluntary bailment, the bailee is held strictly accountable for a misdelivery and is liable for conversion when a misdelivery occurs. However, this is not the rule as to an involuntary bailee. Rather, the involuntary bailee is liable only for negligence and the sole issue is whether the bailee used means which were reasonable and proper to return the goods. The reason for this is clear. In a

voluntary bailment the bailee knows who the bailor is; in an involuntary bailment this is not likely to be the case. Thus, the bailee should not be held liable for returning the goods to the wrong person when the bailee has exercised reasonable care in attempting to return the goods. In other words, the bailee is held liable only for the bailee's negligent or willful acts.

In the problem there was no showing that the means used to return the bond was improper. Therefore, B should win the appeal.

PROBLEM 2.2: W was a guest in the X Hotel which was frequented by wealthy guests. W left her purse in the hotel dining room. The purse, which contained some cash, credit cards and ten pieces of jewelry valued at over $15,000 was found by a bus boy and then returned to Y who claimed the purse as hers. No testimony was offered to show whether the bus boy demanded any identification from Y to establish her ownership of the purse. W sued the hotel to recover the value of the cash and jewelry. Can W prevail?[2]

Applicable Law: Ordinarily a bailee can be liable as a bailee only for goods of which he has actual knowledge. However, if the bailee assumes possession of one good in which another good might reasonably be contained, the finder-bailee can be held liable if the finder-bailee negligently returns both goods to the wrong person.

Answer and Analysis

A bailment is a consensual transaction. Therefore the bailee can only be liable for goods of which the bailee knowingly takes possession. Thus, if a fur coat is checked in a coat check room and in the sleeve of the coat is a fur piece, the bailee is not liable for the piece hidden in the sleeve if it would be unreasonable to assume the bailee had or should have had knowledge of the hidden fur piece. On the other hand, in certain cases it would be reasonable for a bailee who accepts possession of one good to assume that the bailed good might contain another good. For example, if a car is bailed in a parking lot located in the center of a large tourist area, the bailee could be held liable for the car, if stolen as a result of the bailee's negligence, as well as the contents of suitcases contained in the trunk of the car.[3]

2. Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex.Civ.App.1972).

3. See Insurance Co. of North America v. Solari Parking, Inc., 370 So.2d 503 (La.1979), where the court held that since the bailee parking garage operator agreed to accept the bailors' automobile without reservations concerning its contents, the items contained in the bailors' automobile were included in the damages contemplated by the parties to the contract of deposit. Compare Ampco Auto Parks, Inc. v. Williams, 517 S.W.2d 401 (Tex.Civ.App.1974) (parking lot was not a bailee of the contents of a trunk if

Under the doctrine of *respondeat superior*, the hotel could be liable for the action of its employee returning the purse containing the jewelry to the wrong person even though it has no actual notice that the purse contained the jewelry. The hotel was frequented by wealthy patrons and it would not be unreasonable to assume that a guest might keep her jewelry in a purse awaiting some occasion to wear it or to return it to the hotel safe. While this rationale might not apply if W were merely a local resident who had come to the hotel for dinner, a court might reach the same result on the theory that because a hotel could not readily distinguish patrons who were guests in the hotel from patrons who were not guests in the hotel, it would be reasonable to assume that all patrons were guests.

Of course, in no event would the hotel be liable if its employee was not negligent. This is not a case of a voluntary bailment. Therefore, liability for misdelivery is based on negligence.

§ 2.3 Classification of Bailments and Standard of Care

PROBLEM 2.3: A drove her car into B's enclosed parking lot and paid the parking fee. A also selected the spot in which to park the car. However, A left the car keys in the ignition at the request of the attendant. The attendant gave A a ticket on which the following language was printed:

> *Liability. Management assumes no responsibility of any kind. Charges are for rental of space. From 8 AM to 11 PM. Not responsible for articles left in or on the car. Agree to within terms.*

When A returned, A discovered the car had been stolen. A sues B. May A recover?[4]

Applicable Law: A parking lot operation results in a lease or license of space relationship when the motorist parks and locks the car but results in a bailment when the attendant takes possession and control of the car. The conduct of the parties, not the printed words on the ticket, determines the relationship. The parties by a voluntary agreement may limit the liability of the bailee but ordinarily the bailee cannot exempt itself from all liability for negligence.

Answer and Analysis

A can recover. Depositing an automobile in a parking lot may constitute either a lease or license of space or a bailment of the automobile. The difference is whether the owner of the car trans-

contents could not reasonably be expected to be in the trunk).

4. Malone v. Santora, 135 Conn. 286, 64 A.2d 51 (1949). But see, Allen v. Hyatt Regency–Nashville Hotel, 668 S.W.2d 286 (1984).

fers possession and control of the automobile to the lot owner and the lot owner assumes it. Where the attendant collects a fee and designates the area in which to park, but the owner parks and locks the automobile, there is no transfer of possession. Consequently, there is a lease or license and no bailment and generally no liability on the parking lot for theft.

On the other hand, when the attendant takes possession of the car, parks it, retains the key and issues a receipt, possession passes from the owner of the automobile to the lot owner and a bailment is created regardless of what the ticket says. Once the bailment relationship has been created a duty arises to exercise reasonable care to prevent theft. Here the facts are more ambiguous because A selected the space but left the keys. Nonetheless, on balance it seems that because the keys were left in the car at B's request a bailment was created. The provisions on the receipt are of no effect because, absent a contrary statute, a bailee can not by contract relieve itself from all liability for losses resulting from its own negligence. On the other hand, the bailee could limit its liability to a specific dollar amount.[5]

PROBLEM 2.4: A, a jewelry salesperson, while staying at Hotel, placed a case filled with jewelry in Hotel's safe. A state innkeeper statute provides that if the innkeeper provides a safe it shall not be liable for the loss of a guest's goods unless the guest places them in the safe. Another state statute fixes $500 as the maximum amount beyond which the guest cannot recover unless the innkeeper consents to a greater liability. A did not inform Hotel's clerk that there were jewels in the case. The case was subsequently lost and A sues Hotel to recover the value of the jewelry. What result?[6]

Applicable Law: At common law an innkeeper was an insurer of the safety of the guest and the guest's property and was liable for any losses except those occasioned by an act of God, fraud or negligence of the guest. Statutes limiting the liability of innkeepers are very common today. These statutes frequently provide that the innkeeper shall not be liable for the valuables of its guests if the hotel provides a safe for the deposit of articles and the guest does not take advantage of it. The statutes also frequently provide a limit of liability even if the guest deposits the valuables in the safe. Where applicable, the terms of the statute govern the liability of the innkeeper.

5. See Restatement (Second) of Contracts, § 195 (1979).

6. Chase Rand Corp. v. Pick Hotels Corp. of Youngstown, 167 Ohio St. 299, 147 N.E.2d 849 (1958).

Answer and Analysis

A can only recover $500 from Hotel. Modern statutes generally have modified the "insurer's" liability created by the common law. Under the common law the guest did not have to disclose the value of the property in order to impose liability on the innkeeper, but this rule has changed. The modern statutes require a guest to use reasonable care and prudence in the protection of his property. One aspect of this care is the disclosure of the value of the property to the innkeeper in order to hold the inn liable for the excess of that provided for in the statute. Failure to disclose is an act of negligence that precludes recovery beyond $500.

In this case since A did not disclose the contents of the case, A's recovery is limited to the statutory maximum.

PROBLEM 2.5: B loaned A earthmoving equipment pursuant to a contract providing that A would keep and maintain the equipment in good mechanical condition during the term of the agreement and return it to B "in good mechanical condition, ordinary wear and tear excepted." The equipment was destroyed by fire, without negligence on A's part. The trial court held that A was an insurer under this contract and liable for the loss of the equipment. A appealed. What result?[7]

Applicable Law: Generally, a bailee is not an insurer; rather the bailee is liable only if the bailee was negligent. The parties, however, by a valid contract may agree to expand or limit the liability of the bailee. The liability of an insurer will only be imposed, however, where the contract is explicit in that regard. An agreement to return the bailed property in the same condition as when received does not impose the liability of an insurer.

Answer and Analysis

A wins. A bailee is not an insurer of the property in an ordinary bailment. The weight of authority holds that a bailee is not liable for damage to the bailed property resulting from fire or other casualty if the bailee was not negligent. However, a bailee may extend or qualify its liability by contract unless contrary to public policy. Therefore, a bailee may become an insurer if it explicitly contracts that it will be absolutely liable regardless of fault. The general rule, however, is that a covenant to insure is not implied in a contract. It is imposed only where it is found in the agreement in clear and explicit language. An agreement to return

7. St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co., 48 Wash.2d 528, 295 P.2d 299 (1956).

the bailed property in the same condition as when received does not impose such unusual responsibility.

§ 2.4 Liability for Failure to Return Goods

PROBLEM 2.6: A wished to have B repair a ring while B was staying at the C Hotel. A took the ring off her finger in the presence of the hotel cashier and asked her to deliver it to B. The cashier placed the ring in an envelope, wrote B's name on it, and placed it on her desk. The ring was either lost or stolen without being delivered to B. A sues the C Hotel to recover $2,500, the value of the ring. C Hotel defends by saying there was no bailment because A failed to disclose the unusual value of the ring. May A recover?[8]

Applicable Law: A bailment consists of the rightful possession of another's goods. But possession also requires an intent to control and possess as well as control in fact. The delivery and acceptance of a ring creates a bailment even though the receiver was ignorant of the true value of the ring, so long as the bailee could have ascertained the value.

Answer and Analysis

Yes. A bailment has been broadly defined as the rightful possession of goods by one who is not the owner. Possession consists of physical control of the goods with an intent to exercise that control. Where the goods claimed to be bailed are concealed from the bailee, the bailee will not have intended to assume possession of them, and no bailment exists. Here, there is no question as to the identity of the thing bailed, namely a ring. Rather there is a dispute respecting the value of the bailed goods. Since there was an intent on the part of the bailee to accept possession of the ring, a bailment was created. An erroneous estimate of the value of the ring does not release the bailee from liability or result in a conclusion that no bailment is created if the bailee was not prevented from ascertaining the value upon reasonable inspection.[9]

This rule imposes on the bailee the obligation to ascertain the value of the goods rather than imposing a duty of disclosure on the bailor. The rule is subject to criticism at least in those cases where the bailor has information concerning the value of the bailed goods but does not voluntarily disclose that information to the bailee. The

8. Peet v. Roth Hotel Co., 191 Minn. 151, 253 N.W. 546 (1934).

9. If the value of the ring could not be determined upon reasonable inspection, e.g., the ring once belonged to Martha Washington, then the bailee should not be liable for the value of the ring attributable to its historical significance.

rule also causes bailees to limit their liability by contract to a fixed value unless the bailor discloses a higher value to the bailee.

Once it is concluded that a bailment was created, it is necessary to determine what degree of care was owed by the bailee. Historically, it was customary to distinguish bailments on the basis of who derived the principal benefit from the relationship. If the bailment was for the sole benefit of the bailor, then the bailee owed a duty of slight care and was liable only for gross negligence. If the bailment was for the mutual benefit of the parties (the typical bailment), then the bailee owed a duty of ordinary care and was liable for ordinary negligence. If the bailment was for the sole benefit of the bailee, then the bailee owed a duty of great care and was liable for slight negligence. Here, the bailment was one for the benefit of both parties. The ring was accepted by the hotel in the ordinary course of its business, and, therefore, was as a matter of law for its benefit. The duty of ordinary care and liability for ordinary negligence governs. While the historic common-law classification of bailments could have applied in *Peet*, the court rejected the tripartite structure as obsolete preferring to adopt the rule that the bailee must exercise, in all bailments, that degree of care which an ordinary prudent person would have exercised under the same or similar circumstances. At first blush this may appear to be a significant difference. However, actual results in cases applying this more modern standard may not differ much from the results using the historic common-law standard if one of the circumstances to be considered in assessing the degree of care exercisable is whose benefit the bailment was created for.

In order to recover from the bailee, the bailor generally must prove a lack of ordinary care on the part of the bailee. In the usual case this is impracticable, for the bailor is unaware of why the goods were not returned, or why they were returned in a damaged condition. Consequently, many courts follow the rule that if the bailor proves delivery of the chattel to the bailee and a failure to return it, or a return in a damaged condition, then the bailor has presented a prima facie case for recovery. The burden of going forward with the evidence then shifts to the bailee and it must explain its failure to return the chattel, or rebut the prima facie case by showing it had exercised the degree of care required by law. While the bailee has the burden at that point of going forward with the evidence or risk a directed verdict for the bailor, the majority of courts hold that the bailor always has the burden of proof that the bailee was negligent, and that the presumption of negligence in favor of the bailor disappears once the bailee has introduced evidence to the contrary. However, a minority of courts, including *Peet*, hold that the bailee has the burden of persuading the jury the loss of the chattel was not due to his negligence. In this case A

proved delivery to the hotel, and the hotel was unable to show what happened to the ring, or that it had not been negligent. Therefore, the court should direct a judgment for A at the close of B's case.[10]

PROBLEM 2.7: A had a trunk transported by the B Railroad Corporation on its railroad from Providence to Boston. In Boston it was placed in B's warehouse. It could not be found when A came to claim it. The trial judge ruled that if the trunk had been taken from the depot by mistake, without negligence on the part of B, B would not be liable. A appeals this ruling. What result?[11]

Applicable Law: A bailee has an absolute duty to redeliver the bailed goods to the bailor after the purpose of the bailment is accomplished. If the bailee delivers the bailed goods to the wrong person, the bailee is liable to the true owner for conversion, irrespective of negligence. However, if the goods are stolen from the bailee without negligence or wrongdoing on its part, the bailee is not liable. The bailee's liability is absolute in the case of misdelivery, but otherwise it is responsible only for the exercise of due care.

Answer and Analysis

A loses. The judgment should be affirmed. Once the purposes of the bailment have been concluded, a bailee owes to the bailor the duty of redelivering the subject matter of the bailment on demand. While the bailee's duty during the bailment is that of using reasonable care, it is strictly liable if it returns the goods to the wrong person or an unauthorized third party. The bailee also is liable for a conversion if it refuses to deliver the goods to the bailor on the bailor's demand. However if the property was stolen from the bailee during the term of the bailment, the bailee is not liable to the bailor unless the theft occurred as a result of the bailee's negligence.

§ 2.5 Rights of Bailees Against Third Parties

PROBLEM 2.8: O bailed goods to B. The goods were wrongfully destroyed by W. B sues W to recover the value of the goods. W claims that B cannot recover because O owns the goods. The trial court holds that B cannot recover the value of the goods from W. B appeals. What result?[12]

10. In *Peet* the court held that the burden of proof under the above facts was on the hotel to show non-negligence. See generally, Bailment: Allocation of the Burden of Proving the Bailee's Negligence, 43 Mo.L.Rev. 90 (1978).

11. Lichtenhein v. Boston & Providence R.R. Co., 65 Mass. (11 Cush.) 70 (1853).

12. The Winkfield, [1902] Probate 42 (1901). The court held that where a ship containing mail was injured by another vessel and the Postmaster General claimed the right, as bailee of the senders of the mail, to recover the full value of the lost letters from the wrongdoer vessel, "[t]he wrongdoer, having once paid full damages to the bailee, had an

Applicable Law: The bailee, just as a finder, has good title against all the world but the true owner. As against others, the bailee's prior possessory interest is the equivalent of title. This rule accords with the law's general protection of rights acquired by possession. Thus as against a wrongdoer a bailee has a superior title which cannot be defeated by the wrongdoer showing a better title in a third person from whom the wrongdoer's rights in the property are not derived. This rule applies even if the bailee would not be liable to the bailor for loss of or damage to the goods. If the bailee recovers from the wrongdoer, the bailor cannot recover from the wrongdoer as well.

Answer and Analysis

B should win the appeal. A bailee has a good title against a wrongdoer by reason of the bailee's prior possession of the goods. Thus, the bailor can prevail as against the bailee, as can others who have a relatively better title based upon prior possession or an absolute title. A wrongdoer cannot defend a suit by the bailee by showing someone with a title superior to the bailee unless the wrongdoer can claim derivatively from the person with the prior right. If the rule were otherwise, the law would reward only possession without regard to notions of first in time, first in right and would encourage the wrongful taking of goods from the possession of another.

The right of the bailee to recover from the wrongdoer is not dependent upon the bailee being liable to the bailor for the loss of or damage to the goods.

If the bailee recovers from the wrongdoer, any recovery is payable to the bailor and the bailor cannot recover from the wrongdoer in a later suit. Thus, by paying damages to the bailee the wrongdoer acquires a superior title to the bailor. This rule is justified on the rationale that by entrusting the goods to the bailee the bailor implicitly authorized the bailee to take the necessary steps to protect the goods including recovering damages from a wrongdoer. When the bailee sues and elects to claim damages rather than the goods, the bailee acts for the bailor as an agent and binds the bailor. Thus, even though the bailor, had she sued, might have sued for the return of the goods rather than damages, the bailor is bound by the acts of the bailee.

It can be argued that binding the bailor to the acts of the bailee is inappropriate in the case of involuntary bailments. However, the

answer to any action by the bailor."); see also Berger v. 34th St. Garage, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948) (suit by a bailee of merchandise on the behalf of the owner-bailor of the merchandise against a negligent third-party stated a cause of action; reiterated the rule set forth in *The Winkfield* that the bailor cannot recover from the wrongdoer in a later suit).

better view, even in this case, is that the bailor should be bound since any other rule would expose the wrongdoer to multiple suits and the potential of paying twice for the same wrong. Nonetheless some courts have held that where the bailor is known the bailee cannot sue for damages or recovery of the goods.[13]

§ 2.6 Rights of Bailors Against Bona Fide Purchasers

PROBLEM 2.9: O owned a diamond ring which needed cleaning. O left the ring with B, a local retail jeweler to be cleaned. B cleaned the ring, put it in a case in the front of the store and subsequently sold it to P, an unsuspecting customer who paid B the full value of the ring. B refused to pay O the value of the ring. O then sued P to recover the ring. What result?[14]

Applicable Law: At common law a bailor who entrusted goods to a bailee under such circumstances that a reasonable person could believe that the bailee was the owner of the goods was estopped from claiming the goods from a bona fide purchaser for value. A similar rule applies under Section 2–403 of the Uniform Commercial Code, the so-called entruster provision.

Answer and Analysis

While as a general rule a person cannot convey a better title than he or she has to a third person, under certain circumstances it would be inequitable to hold an innocent purchaser for value liable to another for goods purchased from a wrongdoer when the purchaser had no reason to suspect any wrongdoing and paid full value for the goods. This is particularly true in the case of commercial transactions where the purchaser is dealing with a wrongdoer who deals regularly in the goods that are purchased. The rule prohibiting the owner from recovering from the bona fide purchaser for value thus responds to the tension between the desire to protect titles and the desire to foster the movement of goods in commerce by favoring commercial interests.

If an owner entrusts goods to a person who from all outward appearances appears to be authorized to sell the goods to others, it is inequitable to permit the owner to recover the goods from the

13. Barwick v. Barwick, 33 N.C. 80 (1850) ("it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant and force him to pay the value a second time; and the fact that he had paid it in a former suit would be no defense."); Russell v. Hill, 125 N.C. 470, 34 S.E. 640 (1899) (plaintiff who purchased timber from a person who did not have title to the land, did not have an action in trover against a defendant who later converted the timber without right).

14. See, Zendman v. Harry Winston, Inc., 305 N.Y. 180, 111 N.E.2d 871 (1953).

bona fide purchaser. It is inequitable because it is the act of entrusting (an act initiated by the bailor and which the bailor could have avoided) that created the situation which permits the wrong to occur. This position is bolstered by the fact that there is little or nothing the purchaser can generally do to protect him or her self since commercial transactions in goods rely on the fact of possession as the best evidence of title.

The rule is expressed as a rule of estoppel. Thus, an owner is estopped from claiming a superior title as against the bona fide purchaser for value because the owner's acts were largely responsible for the loss and the innocent purchaser was not in a position to protect him or her self.

This theme underlying the common law rule of estoppel is also reflected in Section 2–403 of the Uniform Commercial Code providing that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business." This buyer is defined as a "person who in good faith and without knowledge that the sale to him is in violation of the ownership rights ... of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind."

In the problem, B appears to be a retail jewelry merchant whom P would rightly assume had title to goods in the jewelry case being offered for sale to the public. O was aware that B was a retail jewelry merchant and by entrusting the ring to B should have appreciated there was always a risk that B would commingle the ring with other stock in trade and offer it to sale to the public. Under either the common law or the UCC, P should win.[15]

Neither estoppel nor the entrusting rule applies to stolen property. Thus, is T steals O's watch and T takes the watch to B for repair, a bona fide purchaser from B would not prevail as against O. P can only acquire whatever title the entrustor had. Here the entrustor is T who has no title.

15. Compare, Porter v. Wertz, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1st Dept. 1979), affirmed 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981) (buyer acted in bad faith in purchase of goods from person who was not a merchant).

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe

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PUBLISHERS

4

Bailments

At this point, we turn from a discussion of the means of acquiring possession to one on the methods of transferring the right to possession. Bailment, gift, and sale are the three methods of transferring an object of personal property. This chapter considers bailments. Gifts and sales are introduced in the next two chapters.

Definitions

A ***bailment*** is the transfer and delivery by an owner or prior possessor (the ***bailor***) of possession of personal property to another (the ***bailee***)

(1) whose purpose in holding possession is often for safekeeping or for some other purpose more limited than dealing with the object or chattel as would its owner, and
(2) where the return of the object or chattel in the same, or substantially the same, undamaged condition is contemplated.

This transfer of possession of property for a limited purpose, once accomplished, requires the transferee or bailee to redeliver the property to the transferor or bailor. Put another way, once the purposes of the bailment are accomplished, a failure to redeliver renders the bailee strictly liable. A bailment results in the rightful possession of personal property by a person not its owner.

Bailments affect everyday life. When a person rents a car or parks it in a commercial parking lot, a bailment arises. When you leave your clothes at the cleaner's or your film at the photo shop, a bailment is created. Even borrowing a book from a friend gives rise to a bailment.

Bailments are common in commercial transactions. For banks, pawnbrokers, common carriers, warehouses, and hotels, bailments are at the heart of their businesses. Some commercial bailments, as with warehouses, are treated in detail in the Uniform Commercial Code, Article 7. Thus bailments represent a pervasive form of transfer transaction, arising frequently and in many commercial and noncommercial contexts. Because of this, as we will

see, some judges and commentators have argued that a modern uniform rule is needed for them.

A bailment is the result of a contract or agreement, express or implied, or the conduct of the parties — or some combination of agreement and conduct. Some jurisdictions require an express agreement of some type to create a bailment, but also may imply agreements and bailments from conduct. Identifying a bailment requires, then, that you look not only at the parties' agreement, but also at their conduct — if only as evidence of their implementation of an implied agreement. More generally, then, a bailment may be regarded as the implementation of a contract, as a transfer of property, or as some sui generis hybrid of both contract and property law.

Because the subject of any bailment is personal property, regarding bailments as an area of the law of property takes the most realistic view. Bailments are typically established because of some property interest of the bailor (the owner) in an object.

Bailments typically are limited to tangible personal property, but this term includes pieces of paper representing rights in other things. It is now well settled that securities, bonds, and negotiable instruments may be held in a bailment as well. Whether intellectual property may be held in a bailment is a controversial subject.

The general rules governing bailments are predicated on the absence of a specific agreement that may supersede or vary those rules. In other words, the rules are implied by law in the absence of an agreement to the contrary. In this view, bailments may be founded upon either an express or an implied agreement.

A bailment requires a delivery of possession — without delivery there is no bailment. No particular ceremony is necessary; however, there are three types of delivery. It may be actual, constructive, or symbolic. With an ***actual delivery*** of an object, the object is physically handed over to the bailee. A ***constructive delivery*** occurs when one gives the keys to a safe deposit box or to a heavy or bulky object, such as a bureau or chest of drawers, to the transferee; this transfers control of the object without actually delivering it, and is the gist of a constructive delivery. A ***symbolic delivery*** is the receipt by the bailee of a thing symbolizing the object of the bailment. While this may be something associated with the object, a symbolic delivery usually means transfer by use of a written instrument.

In addition to delivery, a bailment requires the bailee's ***acceptance*** of the delivered property. Like the delivery element, acceptance might not be actual. Constructive acceptance is found when a person comes into possession of an object by mistake or takes possession of it when it is left or lost by its owner.

Without an actual delivery and acceptance, some courts refer generally to the possibility of a constructive bailment without identifying the missing element. A ***constructive bailment*** arises when possession of personal property

is acquired and retained under circumstances in which the recipient should keep it safely and return it to its owner. Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. Ct. 1972) (involving a purse left in a hotel dining room and found by a hotel employee). In *Caranas*, there was no intentional delivery of the purse, but the court found that a constructive bailment arose because the hotel patron would expect that, if found, the misplaced purse would be retained and kept safe for her eventual return. Thus, where there is evidence that the bailee received and accepted the object, but not that the bailor intended to deliver it, a constructive bailment arises for purposes of allocating the loss or damage to the object upon its misdelivery.

Overview of Negligence and Strict Liability

Some of the following material discusses when a bailee is strictly liable and when it is liable only for negligence. Since you may be reading this early in the semester, a quick introduction to negligence and strict liability may be helpful. ***Strict liability***, as you may have guessed, means an actor is liable for damages, notwithstanding any actions he took or failed to take. ***Negligence***, on the other hand, demands the actor be at fault. The elements for negligence depend on the state, but to oversimplify, there must be a standard of care, and the defendant's action or inaction must fall short of the applicable standard of care. If the actor's conduct falls below the applicable standard of care, the actor is negligent.

For the defendant to be liable for his negligence, however, the negligence must be the actual cause of a plaintiff's injuries. In addition, the defendant's negligence must be the proximate or legal cause of the plaintiff's injury. The proximate or legal cause considerations are legal matters including whether the defendant had a duty to the plaintiff not to act in a negligent manner, and whether the legal system believes a defendant should be liable in circumstances of the case. Finally, the plaintiff must suffer actual damages. An actor's "standard of care" varies based on the circumstances and is often a factual determination by a jury as to how a "reasonable person" should act under the circumstances. As this brief discussion indicates, it is easier for a plaintiff to win a strict liability case than it is to win a negligence case.

Specialized Bailment Issues

(a) Pledges

Some bailments have more specialized uses. A ***pledge*** is a bailment to secure a debt or obligation of the bailor. It is a bailment for security. The transfer of

possession need not be made to the pledgee (the creditor or obligee). Instead, it can be to a third party.

(b) Park-and-Lock Cases

One tricky area of bailments is distinguishing a bailment from a lease or license. Identifying a transaction as a bailment — instead of a lease, say — is an important step for the alleged bailor because of the duty placed on the bailee to redeliver the chattel. A failure to redeliver raises a presumption that the bailee negligently handled the chattel in her care.

Take, for example, a parking lot that requires that you pull a ticket to lift a gate at entry, choose the space in which to park, and lock your car so that it cannot be moved by the management. If parking the car in the lot constitutes a bailment, the parking lot operator becomes a bailee, and with it comes the responsibility to care for the car. If the lot operator merely gives the car owner a license to use space to park his car, no bailment results and the car remains under the owner's control. If the space is leased for a definite period of time, the car remains under the control of the car owner, and no bailment exists.

Such a park-and-lock arrangement would have at one time created no bailment. Control over the car, coupled perhaps with an exculpatory clause on the ticket, negated the delivery requirement for a bailment. A license to use the parking space was instead created, or if you paid a fee at entry, perhaps a lease was found. Today a park-and-lock arrangement in some jurisdictions creates a bailment. See Allen v. Hyatt Regency–Nashville Hotel, 668 S.W.2d 286 (Tenn. 1984) (holding that a bailment was created when a car owner parked and locked his car in an indoor multistory garage operated in conjunction with a hotel).

Peeling away the facts in *Allen* shows the difficulties with these cases. What if the lot were outdoors (in a setting in which the operator has less control over the parking spaces)? What if it were not associated with a hotel? The owner of an open park-and-lock lot, in which each space has a separate meter, is an unlikely bailee. Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569 (Tenn. 1973). A license or a lease is a more likely characterization of the arrangement in such a parking lot.

The New Jersey Supreme Court has ruled that the traditional elements of a bailment are inadequate for the enclosed park-and-lock lot cases and has found that a parking lot owner has a duty of reasonable care under all the circumstances of a case and that when the parked car is damaged upon its owner's return, there is a presumption of negligence by the owner of an enclosed lot because (1) the owner is in the best position to absorb and spread the risk of damage; (2) the car owner's expectation is that he will reclaim the car in the condition he left it; and (3) were it otherwise, the owner's proof of negligence while he was away "imposes a difficult, if not

insurmountable, burden" on him. McGlynn v. Parking Authority of City of Newark, 432 A.2d 99 (N.J. 1981).

Even when a bailment is recognized in a transaction, identifying the subject of the bailment may provide further problems. In a jurisdiction in which park-and-lock parking creates a bailment, the bailee will be liable for any vandalism that damages the exterior of the parked car, but might still argue that no bailment was created as to valuables found in — and stolen from — its glove compartment. The ground for this argument is that valuables might be expected to be found in, say, a safe deposit box in a bank, but not in the glove compartment of a car. There are exceptions, however. The operator of a parking garage in a well-known tourist location, such as the French Quarter of New Orleans, may be held to know that tourists carry valuables in the trunks of their cars.

(c) Safe Deposit Boxes

The same preliminary issues occur when a person rents a safe deposit box at a bank: Is the renting of the box a bailment, license, or lease? Despite the use of the word "rent" in transaction, courts usually find a bailment has occurred. The box remains under the bank's control.

Misdelivery of Bailed Property

(a) Strict Liability and Negligence

The relationship between bailor and bailee gives rise to a standard of care and liability for the misdelivery or misredelivery of the object. Causes of action involving bailments are styled in the complaints in either contract or tort. For misdelivery of the bailed object, the bailee is strictly liable in tort, absent a special agreement or a statute. A bailee strictly liable is liable even if the bailee is not at fault for the misdelivery. An important example of a statute absolving a bailee from strict liability for misdelivery is found in the Uniform Commercial Code sections applicable to warehouse operators. U.C.C. § 7-404 (imposing no duty if reasonable commercial standards are used by warehouseman). Otherwise, the bailee is strictly liable for a misdelivery of the chattel. In some states, a rule of strict liability has been replaced by a presumption of negligence — i.e., by a rule that says that unless the bailee can account for the loss of the bailed item in some nonnegligent way, a presumption arises that its loss was the result of the bailee's negligence.

(b) Burden of Proof

The burden of proof in a negligence case of misdelivery is on the bailee — who is generally the defendant in such cases — to show that he did not act

in a negligent manner. The counterargument is that the presumption asks the bailee to prove a negative — that he was not negligent — and that this is a very difficult task.

This burden of proof is assigned to the bailee for five reasons. First, the bailee knows the history of the bailment best. Second, the bailee has the right to sue thieves and converters of the chattel. Third, the bailee is in the best position to take steps to secure (the recovery of) the chattel. Fourth, the risk of damage or misdelivery is best borne by the bailee, since it can spread the risk in its charges to its customers. Fifth, and finally, the assignment serves to prevent the bailee from engaging in fraudulent misdeliveries or other acts. Many of these justifications also justify the imposition of strict liability on the bailee. To some extent, then, the assignment of this burden to the bailee serves as a stand-in or surrogate for strict liability.

Even if the bailee shows that it took reasonable care, a failure to take steps to secure the recovery of the chattel would render it liable, unless it shows that the steps would have been futile.

If a bailee deviates from the terms of the bailment, it will have to show that the deviation makes no difference to the loss or damage. Examples arise when the bailee takes a different route than as instructed, or when the bailee entrusts the goods to a third party without authority, or where the chattel is stored elsewhere than as authorized. The deviating bailee in effect becomes the insurer of the goods and strict liability follows, unless it can show that the deviation was harmless.

(c) What Must Be Redelivered

Generally it is obvious what property must be returned to the bailor. The issue in some cases, however, is what must be delivered back to the bailor. Consider the following four examples:

First, a deposit of money in a bank. Here the same bills are not expected back, so no bailment arises; rather, a debtor-creditor relationship arises between the bank and its depositor.

Second, the deposit of grain into a silo or a grain elevator for its operator to hold for delivery to a railroad. Here the depositor expects that a similar quality of grain will be given over or back, but not the exact grains deposited. If the issue of whether a bailment is created arises in the course of a bankruptcy or insolvency of the silo operator, the answer determines whether the bailor stands in the secured or the unsecured line of creditors. Thus, the purpose of the bailment sometimes determines its presence or absence.

Third, a herd of cattle is put in the care of a farmer. Only if all the animals perished in the hands of the transferee would a court find this to be a bailment. The herd can be expected to suffer attrition if it is mostly bulls, but not so if it is mostly cows. Some courts might hold that the herd as a

whole is the subject of a bailment, but that there is no bailment of the individual animals in it.

Fourth, consider seed delivered to a farmer by a merchant. There is no bailment when the merchant expects a mature crop in return. If bailor and bailee expect a change in the basic nature of the chattel, there is no bailment.

When Bailed Property Is Lost or Damaged

The bailee is liable not only for misdeliveries, but also if the bailed goods are lost or damaged. Strict liability does not apply in lost or damaged property cases. The bailee is liable only in negligence.

The ***standard of care*** traditionally required of the bailee varies with the degree of reward or benefit the bailee receives. A three-pronged rule is used, as follows:

(1) When the benefit of the bailment to the bailee is slight, the care required of the bailee is slight; the bailee is liable only for ***gross negligence***. This is typically a ***gratuitous bailment*** such as a person taking care of an object for a friend or neighbor, or one created by a mistake. Ordinarily, a finder is such a bailee. See Waugh v. University of Haw., 621 P.2d 95, 968 (Haw. 1980) (stating this).

(2) If the bailment benefits both bailor and bailee mutually and is equally beneficial to both, the standard of care imposed on the bailee rises and the bailee is liable for negligence and has a duty of reasonable care under the circumstances. Leaving an item in a packet with the desk clerk of a hotel was found in one case to be a bailment benefitting both the bailor (the guest) and the bailee (the hotel). Peet v. Roth Hotel Co., 253 N.W. 546 (Minn. 1934); Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. Ct. 1972) (involving a purse left in a hotel dining room and found by a busboy). In *Caranas*, for example, leaving the purse unattended on the floor might not create a bailment, but the subsequent assumption of its possession by an employee does — and its subsequent disappearance from the hostess's desk will make the hotel liable for a misdelivery.

(3) Finally, if the bailment benefits the bailee, as with a borrowed object, the bailee's standard of care rises again and the merest neglect or any damage renders the bailee liable. This higher standard of care also applies to certain commercial bailees such as transport companies and repair shops.

This three-pronged standard was first developed in an early American legal treatise by Joseph Story in his *Commentaries on the Law of Bailments.* It was well received at its inception because it offered the American bar a refined view of older contract-based English and American cases and also incorporated into those older cases then-emerging theories of negligence.

Story believed that the duty imposed on a gratuitous bailee could not be the same as that imposed when a consideration was paid. The gratuitous bailee was only liable because of actual performance by the bailee and subsequent reliance by the bailor — in other words, a type of detriment consideration established the bailment.

Story's views have not gone unchallenged. Many courts take a contractual view of bailments because they regard Story's approach as too mechanical. Others think that the focus on the rewards inherent in a bailment excludes an examination of the propriety of the parties' conduct. Still others see this skewed focus, but also perceive a need for one modern general rule that fits ubiquitously all types of bailments; they think that Story's incorporation of negligence law into bailment law did not go far enough. Thus, some courts have abandoned this three-pronged standard of care. They have done so either expressly or with opinions that tend to combine or blur Story's several standards. These courts adopt, expressly or in fact, a rule of reasonable care under the circumstances (including as a circumstance the degree of benefit received by the bailee), making a bailee's liability dependent on the exercise of such reasonable care. This reasonable-care rule juxtaposes the risk and the bailee's conduct; the relationship between the risk and the conduct determines how much care is reasonable under the circumstances.

Nevertheless, Story's three-pronged standard remains the traditional and widely used method of analysis for a bailment where the issue is the standard of care to be applied.

EXAMPLES

Honor Among Thieves

1. Armas steals a valuable wristwatch from its true owner and then takes it to Burrell's shop for repairs. Clayton sees the watch on Burrell's shop counter and takes it. Can Burrell replevy the watch from Clayton?

Parking Lot Tribulation

2. During the early evening hours, Darrell parks his car in an attended parking lot. He gives the keys to the attendant, who asks him how long it will be before Darrell returns. Darrell says that he will return at midnight, two hours after the lot closes. The attendant moves the car into a space visible from the booth and Darrell pays the parking fee for the hours up to closing. The attendant says that at closing he will put the keys to Darrell's car under the floor mat. Darrell nods to the effect that he has heard the attendant, but when he returns at midnight, his car has vanished. Darrell sues the parking lot owner for conversion of the vehicle. In this suit, what result and why?

High-Priced Free Parking

3. Florence went shopping. On the way, she stopped at a drive-through sandwich shop. After paying for her food, Florence put her wallet on the passenger seat. Florence parked her car at Barney's Clothes, Inc., which maintains a free parking lot for its customers. An attendant tends the lot. At the request of the parking lot attendant, Florence left her keys with him. When Florence left her car to go shopping, she inadvertently left the wallet on the car seat.

When trying to pay for a new outfit, Florence missed her wallet and immediately returned to her car. Neither she, the attendant, nor the police could find Florence's wallet. The wallet contained $350. Florence sues Barney's Clothes for the value of the wallet but mainly for the $350. Who prevails?

Borne Away Bearer Bonds

4. A messenger employed by Stock & Co., a corporate securities brokerage firm, is instructed to deliver some bearer or demand bonds of Harmony Company to Bond Brothers, Inc., another securities firm. The messenger is given the bearer bonds of Harman, Inc., instead of those for Harmony Company. He carries the Harman bonds to Bond Brothers. He enters the Bond Brothers' office, approaches the receiving teller's window, rings the bell, deposits the bonds in a secure box to the side of the window, turns away, and returns to Stock & Co. An employee of Bond Brothers quickly notices the mistake, calls "Stock" through the window, and is approached by a man who says, "Yes, stock." The employee hands the Harman bonds to the man, who takes them and vanishes. Has a bailment for the bonds been created at Bond Brothers' office?

Organ Solo

5. The biotechnology industry is in part founded on the use of other people's body parts. Is a bailment created when a diseased organ is removed surgically from a patient by a doctor and later used in research that produces valuable medicine?

Are My Pictures Back?

6. Is a photography laboratory that accepts undeveloped film for processing into prints or slides a bailee of the film? Is this a bailment where the same thing, or a different chattel, is expected back? If there is a bailment, is the lab liable for the value of the film or the value of the prints? Can the fine print on the box of film or the receipt for the film exculpate or limit the liability of the lab?

EXPLANATIONS

Honor Among Thieves

1. Yes. The issue is whether the bailee of a thief acquires the right to sue third-party wrongdoers. The orderly conduct of bailments requires that although the thief has no possessory right to transfer, Clayton should not be able to set up a weakness in the transfer from Armas to Burrell as a defense. That would be deciding the suit on a the basis of Clayton's jus tertii defense — rarely a good idea.

Parking Lot Tribulation

2. The transfer of the keys, as well as the moving of the car by the attendant to a space selected by the attendant, suggests that there is a bailment. Assuming the attendant was acting within the scope of his employment, the crucial question is whether there was a constructive redelivery of the car. Because the action of the attendant made possible the theft, the rule of strict liability or the presumption of negligence should apply. See System Auto Parks & Garages v. Am. Economy Ins. Co., 411 N.E.2d 163 (Ind. App. Ct. 1980).

High-Priced Free Parking

3. This Example derives from Swarth v. Barney's Clothes, Inc., 242 N.Y.S.2d 922 (1963). Barney's Clothes wins. Barney's was bailee of the automobile under the facts, but it does not necessarily follow that Barney's was bailee of the wallet. The elements of the bailment are actual physical control with intent to possess — i.e., delivery and acceptance. Assuming the wallet was "delivered," there was no acceptance or intent to possess. A wallet is not usually possessed by the operator of the parking lot, and the attendant had no notice of the wallet. No bailment of the wallet; thus no liability under the bailment rules.

Borne Away Bearer Bonds

4. These are the facts of Cowen v. Pressprich 192 N.Y.S. 242 (N.Y. Sup. Ct. App. Term), rev., 194 N.Y.S. 926 (1922). The intermediate appeals court first held that a bailment was created. It was at first an involuntary or gratuitous one, to which only the slightest duty attached. When the Bond Brothers employee picked up the Harman bonds, however, it became a voluntary one, and a duty of reasonable care attached. Not having seen the messenger from Stock & Co., the Bond Brothers employee should have required identification, sent the bonds back using its own employees, or called Stock & Co. to check the identity of the messenger. Instead, the court

said, when Bond Brothers undertook to redeliver the bonds, it took the risk of misdelivery upon itself, and so should pay damages for its conversion of the bonds. The intermediate appeals court opinion in *Cowen* was issued over a strong dissent.

On further appeal, the state's highest appellate court adopted the lower court dissenter's analysis based on the fact that Bond Brothers took possession by mistake, and promptly noticed and honestly tried to remedy the mistake, without any intent to interfere with the plaintiff's ownership of the bonds and by an action consistent with the plaintiff's ownership. The highest appellate court concluded that Bond Brothers never accepted delivery and hence did not take on the responsibilities of a bailee. Because no bailment was created in Bond Brothers, Bond Brothers was not strictly liable for misdelivery of the Harmon bonds.

Organ Solo

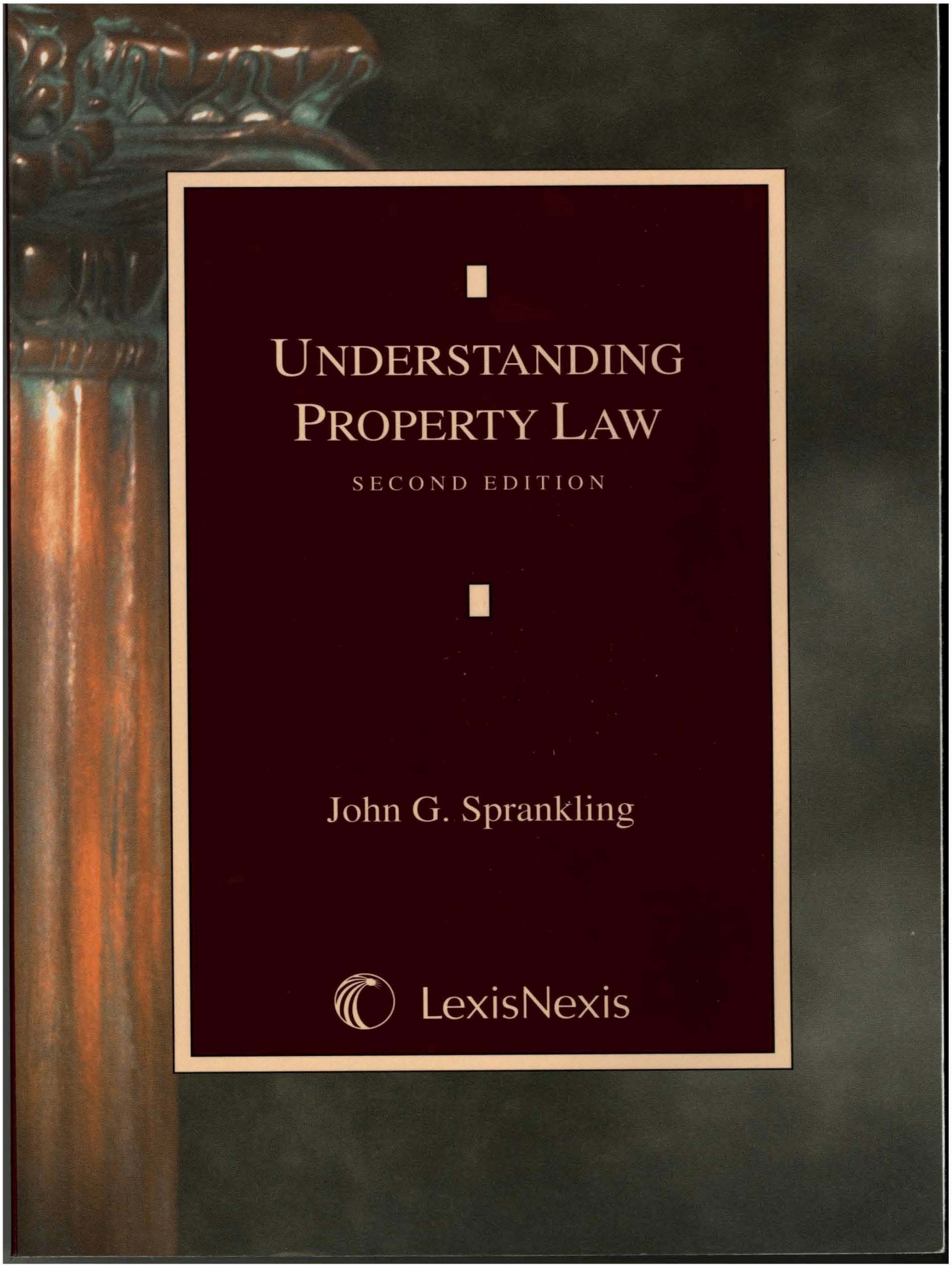
5. Several issues arise. Many are discussed in Moore v. Board of Regents of the University of California, 793 P.2d 479 (Cal. 1990) (finding a breach of fiduciary duty and no patient consent, but not conversion). The first is whether a human organ can be the object of a bailment by the donor. Many courts and statutes frown on treating the human body as an object to be bought and sold in commerce. Many states refuse to recognize the organ as personal property; hence the bailment rules would not apply.

If the bailment rules do apply, the issue turns on whether the patient intended to give the organ to the surgeon for any purpose or for a limited purpose of destroying it according to law, whether the patient abandoned or released all interest in the organ, or whether the patient retained a property interest in the organ. Since there is no evidence that the patient intended to deliver the organ to the surgeon for research purposes, if the state permits a bailment in this situation, a finding of bailment — or at least constructive bailment — and conversion seems appropriate.

Are My Pictures Back?

6. The laboratory is a bailee. In the end, it does not matter. The photos to be returned can be traced to the original film, which distinguishes this case from one of fungible goods. The lab is liable for the price of the film. This may be a case where the lab can limit its liability. Some courts may not allow a bailee to limit its liability for its own negligence, however. This Explanation also assumes the laboratory has no reason to know of any "special circumstances" about this film's importance. See Carr v. Hoosier Photo Labs, 441 N.E.2d 450 (Ind. 1982) (holding, first, that it was a bailment to return the film, though in a new form; second, that the photographer accepted the terms of the exculpatory provision on both the box of film and the receipt

for the film given by the lab; and third, that the provision was neither unconscionable nor void). *Carr* involved an experienced amateur photographer, also an attorney with a business law practice, who took a European trip and brought back 18 rolls of exposed film for processing to a major film manufacturer's lab. Four of the rolls were lost and never accounted for. The photographer won a $13.60 judgment for the value of the film, but lost a lower court's award of $1000 for the value of his prints to him.



UNDERSTANDING PROPERTY LAW

SECOND EDITION

John G. Sprankling

LexisNexis

Chapter 7

OTHER PERSONAL PROPERTY RULES

SYNOPSIS

§ 7.01 Accession

[A] Basic Rule

When one person uses labor or materials to improve a chattel owned by another, the doctrine of accession determines who receives title to the resulting product.[1] The original owner of the chattel almost always retains title where the improver acted in bad faith (e.g., stole the chattel). Under some circumstances, however, the accession doctrine may vest title in the good faith improver. If title is awarded to the improver, he or she is obligated to compensate the original owner for the value of the chattel in unimproved condition.

Accession illustrates the strong influence of Lockean labor theory on American property law. Locke posited that each person owns his own body, and thus his own labor; if one mixes his labor with raw materials found in a "state of nature" to produce a new item, it is owned by the laborer (*see* § 2.03[A]). It was simple for common law courts to extend this principle to the analogous situation where the improver mistakenly believes that he or she owns the raw materials. As between the industrious improver and the idle owner, accession assigns title to the improver, thereby rewarding and encouraging productive labor.

[B] Addition of Labor Only

One branch of the doctrine involves adding *only labor* to a chattel owned by another. Suppose that S uses O's clay to create a valuable sculpture, mistakenly believing that O agreed to this use. Who owns the sculpture? As a general rule, one who in good faith applies labor to another's property acquires title to the resulting product if this process either (1) transforms the original item into a fundamentally different article (e.g., seeds planted to produce a crop)[2] or (2) greatly increases the value of the original item (e.g., timber made into barrel staves).[3] Under this doctrine, S owns the sculpture; O is entitled to damages equal to the fair market value of the original clay.[4]

[C] Addition of Labor and Materials

The other branch of accession involves adding *both labor and materials* to another's chattel. When materials owned by two different owners are combined together in good faith, the owner of the "principal" materials

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[1] *See generally* Richard A. Epstein, *Possession as the Root of Title*, 31 Ga. L. Rev. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

[2] *But see* Bank of Am. v. J & S Auto Repairs, 694 P.2d 246, 249 (Ariz. 1985).

[3] *Compare* Wetherbee v. Green, 22 Mich. 310 (1871) (when standing trees worth $25 were converted into barrel hoops worth about $700, the innocent trespasser owned the hoops), *with* Isle Royale Mining Co. v. Hertin, 37 Mich. 332 (1877) (when standing trees worth about $1 per cord were converted into firewood worth $2.87 per cord, no accession occurred).

[4] B.A. Ballou & Co. v. Citytrust, 591 A.2d 126 (Conn. 1991).

acquires title to the final product. For example, suppose M innocently installs a custom truck body on a bare truck frame owned by O. If M's materials add more value to the finished truck than O's frame, M owns the truck; O receives only the fair market value of the frame.[5]

§ 7.02 Adverse Possession of Personal Property

[A] Traditional Approach

Title to personal property can be acquired through adverse possession.[6] Most courts apply the adverse possession standards for real property (*see* Chapter 27) to chattels as well, either directly or by analogy. Thus, under the traditional view, one whose possession of a chattel is *actual, adverse, hostile, exclusive, open and notorious,* and *continuous* for the appropriate statute of limitations period obtains title to it, subject to the qualifications discussed below. The limitations period for recovery of a chattel (usually 2-6 years) is shorter than the parallel period for real property (usually 5-20 years). In most states, the limitations period begins running when the adverse possessor obtains possession of the chattel.[7]

[B] Critique of Traditional Approach

Application of the real property adverse possession standards to chattels is troublesome. Suppose that for six years X possesses a valuable antique vase owned by Z; X displays the vase prominently in his living room during this period. Is this conduct sufficiently "open and notorious"? If the elements of adverse possession are intended to give adequate notice to the true owner of the chattel so as to start the statute of limitations running, one might argue that X's acts are insufficient because Z is unlikely to receive notice.[8]

Under the traditional approach, however, X has probably acquired title to the vase. After all, X has used the vase in the same manner that any normal owner would. What more could X do? The difficulty here stems from the fundamental difference between real and personal property. Because real property is immobile, its ordinary use by an adverse possessor may provide notice to the true owner; the law presumes that owners periodically inspect their lands. Yet because a chattel is portable, the adverse possessor's ordinary use will normally not put the true owner on notice.

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[5] Eusco, Inc. v. Huddleston, 835 S.W.2d 576 (Tenn. 1992); *see also* Ballard v. Wetzel, 1997 Tenn. App. LEXIS 699 (defendant gained title to Corvette through accession).

[6] *See generally* J.B. Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 23 (1889); Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 Buff. L. Rev. 119 (1989); R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. Rev. 1221 (1986).

[7] *See generally* Henderson v. First Nat'l Bank, 494 S.W.2d 452 (Ark. 1973) (successful adverse possession of stock).

[8] *Cf.* O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

[C] Emerging Approaches

[1] Discovery Approach

A small group of states has responded to the inadequacy of the traditional standard by adopting a "discovery" approach, particularly where the chattel has artistic, historic, or other special importance. In these states, the statute of limitations begins running only when the true owner actually knows (or reasonably should know) that the adverse possessor holds the item. Thus, as a practical matter, the limitations period does not commence unless the conduct of the adverse possessor is obvious enough to place a diligent owner on notice.

The New Jersey Supreme Court's decision in *O'Keeffe v. Snyder*[9] illustrates the discovery approach.[10] Three pictures painted and owned by plaintiff Georgia O'Keeffe disappeared from an art gallery in 1946; O'Keeffe learned in 1976 that defendant Snyder had acquired the paintings and brought a replevin action against him. Snyder claimed ownership by adverse possession, asserting that the applicable six-year limitations period had expired in 1952. Observing that the traditional adverse possession standard may not be sufficient to put the original owner on actual or constructive notice when art or other chattels are merely displayed in a private home, the court adopted the discovery rule in its stead. Thus, "if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run."[11]

The discovery approach imposes a significant burden on the adverse possessor. For example, in order to commence the limitations period for recovery of a painting, the adverse possessor might be required to maintain the painting on public display in a museum or to publish periodic newspaper advertisements seeking the true owner. Ironically, the good faith adverse possessor who is unaware of any competing claimant will be unlikely to take these steps and thus will not acquire title. Yet the bad faith adverse possessor who knowingly complies with the law will obtain title from the negligent owner.

[2] "Demand and Refusal" Approach

The "demand and refusal" approach adopted by New York affords owners even greater shelter than the discovery approach. Under this view, the limitations period for a replevin action against the good faith purchaser of a stolen chattel does not commence until the purchaser receives and refuses the owner's demand to turn over possession of the item.[12]

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[9] 416 A.2d 862 (N.J. 1980); *see also* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (following *O'Keeffe* approach).

[10] The case is analyzed in Paula A. Franzese, *"Georgia on My Mind"—Reflections on* O'Keeffe v. Snyder, 9 Seton Hall L. Rev. 1 (1989).

[11] O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

[12] Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991).

§ 7.03 Bailments

[A] Bailments in Context

Broadly defined, a bailment is the rightful possession of chattels by someone other than the owner.[13] Bailments are ubiquitous in everyday life. For example, bailments are created when: A borrows B's book; A leases B's trailer; B stores her furniture in A's warehouse; and A finds B's lost watch. In each instance, A is a *bailee* (the person holding possession of the item) and B is a *bailor* (the owner of the item). The bailee is obligated to care for the item, and ultimately to redeliver it to the bailor.

The law governing bailments is extraordinarily complex. Over the last century, a property-based approach to bailments has slowly eclipsed the traditional contract approach. Certainly, many bailments stem from contract (e.g., A leases a car from Avis). The resulting impetus to explain bailments in contract terms was understandable; and decisions in some states still recite the necessity for an express or implied contract before a bailment may be found. Yet two types of bailments do not fit neatly into the contract model: many gratuitous bailments arise from agreement, but do not involve consideration; and involuntary bailments are imposed by law, in the absence of agreement. The property approach is broad enough to encompass all bailment categories. Yet the influence of the contract model lingers in some jurisdictions.

[B] Creation

[1] Possession of Chattel

Under the property-based approach, a bailment arises when the bailee has rightful possession of a chattel owned by another person. Possession means (1) physical control over the chattel and (2) the intent to exercise that control. For example, suppose O obtains a safe deposit box at B Bank; both O and B Bank have a separate key to the box, and both keys are required to open the box. These facts create a bailment because B Bank, as bailee, exercises control over the vault in which the safety deposit box is located. O, the bailor, cannot obtain access to her box without B Bank's consent.

[2] "Park and Lock" Arrangements

One of the most intriguing bailment issues concerns the status of cars parked pursuant to "park and lock" arrangements. Assume O drives his car into the entrance to L's parking lot, takes a ticket from L's machine that causes the barrier gate to raise, parks and locks the car, and retains

[13] Scholarship on bailments includes R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992); Kurt P. Autor, Note, *Bailment Liability: Toward a Reasonable Standard of Care*, 61 S. Cal. L. Rev. 2117 (1988).

his keys. Exit from the lot is controlled by L's employee, a cashier in a booth; L's security employees patrol the lot periodically. O returns to find that his car has been stolen. Can O now sue L for breach of the bailee's duty of care?

Cases are almost evenly split on the point. A bailment was found in the leading case of *Allen v. Hyatt Regency-Nashville Hotel.*[14] There the Tennessee Supreme Court emphasized that the car owner had utilized an indoor commercial garage located in a hotel. In addition to the hotel employee who monitored the exit, hotel security personnel patrolled the area regularly. The court concluded that these facts created the requisite control for a bailment to exist, even though the car owner retained his keys and chose his own parking space.

Ellish v. Airport Parking Company of America, Inc.[15] illustrates the opposing viewpoint. The New York appellate court explained that the airport parking lot at issue was designed to provide temporary storage space for cars in an urban area, quite unlike the "traditional warehouses of the professional bailee with their stress on security and safekeeping."[16] It observed that the plaintiff retained as much control as possible over the car; she chose her own parking space, retained her keys, and did not expect the defendant to move the car during her absence. Further, plaintiff was warned when she entered the lot that it was not attended. The court reasoned that she had no expectation that the defendant would take special precautions on her behalf. Thus, the relationship was one of license, not bailment.

[C] Duties of Bailee

[1] Basic Standard of Care

The legal principles defining the bailee's duty of care are in transition. During the nineteenth century, most states adopted a rather intricate approach developed by Supreme Court Justice Joseph Story, under which the bailee's duty of care varied according to the type of bailment involved.[17] If the bailment was solely for the benefit of the bailor (e.g., when a finder finds a lost article), the bailee was liable only for gross negligence. If the bailment was for the mutual benefit of bailor and bailee (e.g., when a customer test drives a dealer's car), the bailee was held to the ordinary negligence standard. Finally, if the bailment was solely for the benefit of the bailee (e.g., when a neighbor borrows a lawn mower), the bailee was liable for damage caused by even slight negligence.

Today almost all states[18] have replaced this elaborate system with the

[14] 668 S.W.2d 286 (Tenn. 1984).

[15] 345 N.Y.S.2d 650 (App. Div. 1973).

[16] *Id.* at 653.

[17] Peet v. Roth Hotel Co., 253 N.W. 546 (Minn. 1934).

[18] *But see* First American Bank v. District of Columbia, 583 A.2d 993 (D.C. Ct. App. 1990) (district's impoundment of illegally-parked car was for mutual benefit of district and car owner, so district was required to exercise ordinary care).

ordinary negligence standard.[19] Regardless of the category of bailment involved, this modern view requires a bailee to exercise the same degree of care that a reasonable person would exercise under the circumstances.[20] For example, in *Peet v. Roth Hotel Co.*,[21] a hotel was held liable for the value of a ring that was lost after the plaintiff bailor entrusted it to the hotel's cashier for delivery to a hotel guest.[22] As is typical in bailment disputes, the plaintiff was unaware of the circumstances surrounding how the hotel lost the ring, and thus unable to prove negligence. The Minnesota Supreme Court followed the modern solution to this proverbial dilemma; it ruled that plaintiff established a prima facie case by proving only that the bailment existed and the ring was not returned to him. This shifted to the hotel the burden of providing evidence that the ring was lost without any negligence on its part, a burden it could not meet.[23]

[2] Misdelivery

In contrast, the bailee who delivers the item to the wrong person is usually held strictly liable, on the theory that this constitutes conversion. If O leaves his rare book behind in R's restaurant where it is later destroyed by flooding, R will be liable only if the damage was caused by R's own negligence. But if R, in complete good faith and after exercising all due care, instead delivers the book to T (a third party who has no legal right to it), then R is strictly liable. Most commentators agree that this distinction makes little sense.[24] The bailee's liability should be governed by a uniform standard, not by a standard that varies according to the type of event that causes the loss.[25]

[3] Exculpatory Contracts

Bailees often attempt to exculpate themselves from future negligence by contract, using a variety of methods (e.g., language on claim check or sign on wall). In general, American courts will not enforce a provision that limits the bailee's liability if the bailor is not actually aware of the provision. Even where the bailor is so aware, many courts refuse to uphold such provisions

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[19] For criticism of the traditional approach, see Kurt P. Autor, Note, *Bailment Liability: Toward a Standard of Reasonable Care*, 61 S. Cal. L. Rev. 2117 (1988).

[20] *See generally* R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992).

[21] 253 N.W. 546 (Minn. 1934).

[22] *See also* Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972) (hotel liable when its cashier delivered lost purse to wrong person).

[23] *See also* Buena Vista Loan & Sav. Bank v. Bickerstaff, 174 S.E.2d 219 (Ga. Ct. App. 1970) (applying common law rule); Singer Co. v. Stott & Davis Motor Express, Inc., 436 N.Y.S.2d 508 (App. Div. 1981) (applying parallel rule in Uniform Commercial Code § 7-204 to dispute between merchants).

[24] *See, e.g.*, R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97 (1992).

[25] Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. App. 1972) (adopting negligence standard for bailee's misdelivery of restaurant customer's mislaid purse).

on public policy grounds, especially where there is a disparity of bargaining power between the parties.[26]

§ 7.04 Bona Fide Purchasers

[A] General Rule

Suppose T steals 20 bags of wheat from O, and then sells them to B, who pays fair value and believes in good faith that T owns the wheat. As between O and B, who owns the wheat? As a general rule, a seller of personal property cannot pass on better title than he or she possesses, even to a bona fide purchaser. Thus, O still owns the wheat. Because T's mere possession of the wheat gave him no rights to it, he could not transfer title to B. This common law principle is codified in Uniform Commercial Code § 2-403(1): "A purchaser of goods acquires all title which his transferor had or had power to transfer."[27] This approach places a heavy burden on the buyer to investigate the validity of the seller's title, and presumably serves the policy goal of deterring theft. In theory, as the difficulty of selling stolen goods increases, the rate of theft should decline.

[B] Exceptions

[1] Overview

Common law courts recognized that strict adherence to the rule would greatly impair legitimate commerce. Suppose O recovers his wheat and seeks to sell it to M. O may be unable to prove his ownership to M's satisfaction; during the era when the rule evolved (and still today, in most instances), there were no public records that identified the owner of a particular chattel. In addition, from the perspective of law and economics, even if O's ownership could be proven, the transaction costs might be high. Prospective buyers like M might be reluctant to purchase O's wheat for either reason.

As a result, courts developed several exceptions that protect the title of a bona fide purchaser of personal property under limited circumstances. In order to qualify as a bona fide purchaser, a buyer must both (1) pay valuable consideration and (2) believe in good faith that the seller holds valid title. The same principles are incorporated into the Uniform Commercial Code, which protects the good faith purchaser for value in specific situations.

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[26] *But see* Carr v. Hoosier Photo Supplies, Inc., 441 N.E.2d 450 (Ind. 1982) (enforcing clause in bailment contract for film processing where photographer was experienced attorney and thus had equal bargaining power).

[27] U.C.C. § 2–403(1).

[2] Entrustment of Goods to Merchant

One exception involves the owner who entrusts goods to a merchant.[28] Suppose that O breaks her diamond bracelet, and brings it to J, a jeweler, for repair; J then sells the bracelet to B, a bona fide purchaser. B now owns the bracelet. Under the Uniform Commercial Code, one who entrusts possession of goods to a merchant who deals in goods of that kind gives the merchant power to transfer title to a bona fide purchaser in the ordinary course of business.[29] The common law rule is substantially the same.

The conventional rationale for this doctrine is estoppel. By placing her bracelet in the hands of J, a merchant who regularly sells jewelry, O impliedly represents to the world that J is authorized to sell it. In other words, by her conduct O is estopped to deny J's authority when the rights of a bona fide purchaser are involved.

[3] Goods Obtained by Fraud

Another exception concerns goods that a buyer procures from an owner by fraud. The buyer's title to the goods is not void, but merely voidable if and when the owner successfully litigates the issue. Until then, the buyer can transfer valid title to a good faith purchaser for value.[30] Suppose O sells his ancient Roman statue to F in exchange for a painting that F fraudulently claims was painted by Picasso; F then sells the statue to B. If B is a bona fide purchaser, she now owns the statue. As between the wholly innocent bona fide purchaser, on the one hand, and the original owner who could have prevented harm by exercising due care, on the other, justice imposes the loss on the more culpable party, the original owner.

[4] Money and Negotiable Instruments

Finally, the bona fide purchaser of money or negotiable instruments (including checks, promissory notes, and the like) prevails over the original owner.[31] For example, if T steals a $1,000 bill from O's safe, and gives it to bona fide purchaser B in exchange for a used car, B owns the bill. The reason for this exception is apparent: commerce would be paralyzed if the recipient of money or other forms of payment bore the burden of investigating the payor's title.

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[28] U.C.C. § 2–403(2).

[29] *See* U.C.C. § 1-201(b)(9) (defining "buyer in ordinary course of business").

[30] U.C.C. § 2–403(1); *see also* Midway Auto Sales, Inc. v. Clarkson, 29 S.W.3d 788 (Ark. Ct. App. 2000) (where A used fraudulent check to purchase car, he held voidable title); Kotis v. Nowlin Jewelry, Inc., 844 S.W.2d 920 (Tex. App. 1992) (where B used forged check to buy watch, he held voidable title).

[31] U.C.C. § 3–305 (protecting "holder in due course"); U.C.C. § 3-302 (defining "holder in due course").

§ 7.05 Property Rights in Body Parts

[A] The Controversy

A wishes to sell her kidney to B. C and D, a married couple in the middle of divorce proceedings, dispute "custody" of a frozen embryo. Both situations raise the same question: can property rights exist in human bodies or body parts?

The United States seemingly answered this question with a firm "no" when the Thirteenth Amendment[32] abolished slavery for moral, philosophical, and religious reasons.[33] In the post-Civil War era, one human being could no longer own another. The same rationale logically suggested that one person could not own *part* of another, but the issue rarely surfaced. To the contrary, human blood and hair—once removed from the body—were routinely treated as property and regularly sold. While the law did not allow people to sell themselves into slavery, it did permit them to sell certain replenishable body parts.

In recent decades, extraordinary advances in medical technology have reopened the issue. When organ transplants became feasible, for example, the need for human organs skyrocketed. Similarly, the development of in vitro fertilization and other reproductive technologies designed to help infertile couples have created a growing demand for human genetic materials (eggs and sperm) and embryos. The use of body parts for these purposes raises complex questions that our legal system has only begun to address.

Two principal issues arise: (1) who has decision-making authority over the human body and body parts? and (2) to what extent can government restrict this authority? Property law may help to answer these questions, either directly or by analogy.

[B] Rights in Body Parts Generally

[1] The Role of Property Law

The law generally acknowledges the authority of all persons to control the destiny of their body parts. Replenishable body parts such as blood, bone marrow, and hair present the clearest illustration of this principle.[34] For example, A may cut her hair and then (a) transfer it (e.g., as a token given to a loved one), (b) use it (e.g., in making a wig), or (c) exclude others from its possession (e.g., by keeping it in a drawer).

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[32] U.S. Const. amend. XIII, § 1.

[33] Before the Thirteenth Amendment, the American legal system protected property rights in slaves. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857) (observing that the "right of property in a slave is distinctly and expressly affirmed in the Constitution"); The Antelope, 23 U.S. 66 (1825); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

[34] *See, e.g.*, United States v. Garber, 607 F.2d 92, 97 (5th Cir. 1979) (noting that blood plasma, "like any salable part of the human body," is tangible property).

The same principle applies, though with somewhat less force, to nonreplenishable body parts. Suppose B has two kidneys, while his brother C needs a kidney transplant to survive. The law would allow B to donate one kidney to C, and indeed society would applaud this decision. It saves C's life, while allowing B's own life to continue unimpaired. B thus has the authority to decide the future of his kidney; he can transfer it to C, or continue to use it himself and exclude others from its use. Yet B's decision-making authority is limited by law. Presumably B could not donate both of his kidneys to C, because this would be the equivalent of suicide. Moreover, while B may unquestionably donate one kidney to C or anyone else,[35] B may not sell his kidney for transplantation. The National Organ Transplant Act prohibits the sale in interstate commerce of any human organ "for use in human transplantation."[36] There is, however, a flourishing international market in body organs.

How should we characterize the respective rights of A and B in the examples above? From the perspective of property law, their rights closely resemble those in the traditional "bundle of sticks," including the rights to transfer, use, and exclude.[37] Yet many courts have proven reluctant to adopt a pure property law approach to the area.

[2] *Moore v. Regents of the University of California*

[a] The Issue

The most prominent decision in the area—*Moore v. Regents of the University of California*[38] —involved extreme facts. While treating plaintiff Moore for leukemia, physicians at the UCLA Medical Center discovered that some of his white blood cells ("T-lymphocytes") possessed an unusual quality: they overproduced certain proteins ("lymphokines") that regulate the body's immune system. This quality would make it easier for researchers to identify the genetic material that produced a particular lymphokine; large quantities of that lymphokine could then be manufactured and used to help in the treatment of disease. Moore's cells were not genetically unique; rather, this overproduction was apparently caused by his leukemia. In short, Moore's cells had potential commercial value; but no one informed Moore of this.

Removal of Moore's spleen was necessary to save his life. Moore consented to the operation, but was unaware that the physicians had retained his

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[35] The Uniform Anatomical Gift Act, which authorizes the gift of body organs, has been adopted in all fifty states.

[36] 42 U.S.C. § 274e.

[37] *See* Newman v. Sathyavaglswaran, 287 F.3d 786 (9th Cir. 2002) (where coroner removed corneas from bodies of deceased children for transplantation, parents had property right in children's bodies sufficient to challenge removal).

[38] 793 P.2d 479 (Cal. 1990). For case notes on *Moore*, see Laura M. Ivey, Comment, Moore v. Regents of the Univ. of California: *Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 Ga. L. Rev. 489 (1991), and Stephen A. Mortinger, Comment, *Spleen for Sale:* Moore v. Regents of the Univ. of California *and the Right to Sell Parts of Your Body*, 51 Ohio St. L.J. 499 (1990).

spleen (and other bodily fluids and tissues extracted during follow-up visits) for research purposes. Eventually, the physicians were able to use Moore's cells as raw material to produce a "cell line" (a "culture capable of reproducing indefinitely"); they received a patent on the cell line.[39]

Moore sued the Regents (as owners of the Medical Center), the physicians, and others for damages on various causes of action, including conversion. To sustain a cause of action in conversion, a plaintiff must show wrongful interference with ownership or possession of personal property. Defendants demurred to Moore's complaint, asserting that he could not meet this standard as a matter of law. Moore, on the other hand, insisted that he continued to own the cells after they were removed from his body. The case ultimately reached the California Supreme Court.

[b] The Decision

The majority held that Moore retained no ownership interest in the cells after removal, and thus could not sue on a conversion theory.[40] Interestingly, the court seemed to assume that Moore had decision-making control over his cells before removal, consistent with the general principle that a person has broad autonomy over his body. While sometimes seeming to follow a property rights analysis, however, the court was unwilling to characterize the removed cells as Moore's property, for two main reasons.[41]

First, it concluded that a California statute governing the disposition of human body parts following scientific use drastically preempted the patient's control over removed cells. "[T]he statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law."[42] The implication here is that Moore effectively "owned" his cells before they were removed, when his rights were eliminated by a specialized statute.

Second, striking a utilitarian theme, the court reasoned that recognizing conversion liability would harm society by discouraging vital medical research. Fearing strict liability for conversion—regardless of good faith—scientists and biotechnology companies would be reluctant to conduct such research because "clear title" to human cells could never be established. The key to understanding the majority opinion is the unusual context in

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[39] *See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that living, human-made micro-organism may be patented).

[40] *See also* Greenberg v. Miami Children's Hospital Research Institute, Inc., 264 F. Supp. 2d 1064 (S.D. Fla. 2003) (where Canavan disease patients provided tissue and blood to scientists only for purpose of research regarding gene that caused disease, and same scientists later secured a patent on the relevant gene sequence, court dismissed patients' conversion claim but not their unjust enrichment claim).

[41] Even if Moore owned the cells, the majority asserted, he did not own the patented cell line; the cell line was a distinctly new type of property—the product of creative effort applied to fungible raw materials. This conclusion is consistent with the common law doctrine of accession. *See* § 7.01 (discussing accession).

[42] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 492 (Cal. 1990).

which the case arises: the surgical removal of body parts ultimately used for medical research.

The decision sparked a mixture of concurring and dissenting opinions. For example, one concurring justice raised moral objections to any sale of the "sacred" human body. Adopting a formalistic "bundle of rights" analogy, a dissenting justice argued that Moore at least retained one property right despite the statute: the *"right to do with his own tissue whatever the defendants did with it."*[43]

[c] Reflections on *Moore*

Moore provoked a firestorm of critical legal commentary, more directed toward the rationale than the result.[44] If Moore owned his cells before the removal, which the majority seems to assume, it is not clear how he lost ownership. More to the point, how did the defendants *obtain* ownership? It is tempting to dismiss the opinion as counterintuitive: Moore cannot own his cells, but the defendants can own them? Why?

Much of the difficulty stems from the court's reluctance to concede that property rights can exist in human cells. Certainly, once the cells were removed from Moore's body, they were a type of property for some purposes. If a thief had stolen the cells from the Medical Center, he could have been sued in conversion by the Regents and also prosecuted for larceny; and if the Center had burned down, presumably the fire insurance policy would have covered the value of the destroyed cells.

On the other hand, if the cells were deemed property, then the majority must explain why Moore lost ownership. Some observers question the court's interpretation that the statute eliminated *all* of Moore's rights. The statute on its face is merely a health measure, intended to protect the public from disease caused by the improper disposal of human tissue, not a statute intended to abridge property rights. Moreover, the statute only restricts the disposal of such tissue "following conclusion of scientific use." It does not purport to restrict the use or transferability of human tissue *before* or *during* scientific use. Thus, as the dissenting justice points out, Moore logically retained at least one stick in the metaphorical bundle: control of the future scientific use of his cells.

Why didn't Moore lose his rights by abandoning the cells? This finding was unavailable to the court due to the procedural posture of the case. The case arose on demurrer, where all facts pleaded in the complaint are presumed to be true. Moore (unsurprisingly) did not plead facts establishing abandonment.

The court might have reached its result by a different route. It could have agreed that Moore owned the cells, but held that his property rights did not include the right to sell them or otherwise profit from their commercial

[43] *Id.* at 510 (Mosk, J., dissenting).

[44] *See, e.g.*, E. Richard Gold, Body Parts: Property Rights and the Ownership of Human Biological Materials (1996); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts, in* Property Rights (Ellen F. Paul et al., eds. 1994).

use. Just as body organs cannot be sold for transplantation purposes, many other forms of property are "market-inalienable." They can be given away, but for reasons of public policy, they cannot be sold.[45]

[3] Should Human Organs Be Sold?

The demand for human organs in the United States far outstrips the supply. Thousands of patients who desperately need kidney transplants, for example, will not receive them due to a chronic shortage of available kidneys. Many law and economics scholars argue that the federal ban on the interstate sale of organs should be lifted. They assert that a free market serves as an efficient system for allocating all scarce resources. From this perspective, the shortage of organs is easily explained: potential providers have no incentive to supply organs because they cannot receive payment. Allowing the sale of human organs would solve this problem. Suppose A wishes to sell her extra kidney to B, who will die without an immediate transplant. Permitting the proposed A-B sale maximizes the utility of each; B lives and A receives payment. Under this view, a free market in human organs maximizes overall social utility.

The sale of human organs is extraordinarily controversial, raising some of the same concerns that surround legal constraints on abortion and prostitution.[46] Personhood theory would object to organ sales as incompatible with human dignity. The same reasons that supported the abolition of slavery suggest that the human body—and therefore body organs—cannot be treated as mere property. Under this view, the state should intervene to protect A and other potential sellers, even over their objection. Conversely, sales of body organs would be consistent with libertarian theory: if A and B, as competent adults, voluntarily agree to a kidney sale, the state should not restrict their autonomy. Even as all persons have the fundamental right to control their own bodies, this approach holds that all persons have complete decision-making authority over parts of their bodies, without any need for the societal paternalism inherent in the current ban.

Some utilitarian theorists suggest that the social cost of organ sales may outweigh any benefit. Under the current regime, organs are available for transplantation at no cost. Permitting organ sales would tend to increase the overall cost of medical care. Moreover, a market approach would exacerbate the division between rich and poor. Today the patient's wealth is largely irrelevant in the allocation of available organs. But under a market approach, organs would tend to go to the rich, not to the poor. For the same reason, the poor would be more likely suppliers of organs than the rich, presenting concerns of human exploitation.

A final concern is the social burden caused by unregulated organ sales. Suppose A sells not only her kidney, but—in a future era of transplantation

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[45] Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987); *see also* Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material*, 61 Wash. & Lee L. Rev. 257 (2004).

[46] *See* Henry B. Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. Health Pol. Pol'y & L. 57 (1989).

technology—also sells her corneas, arms, legs, and other nonrenewable body parts. If A is blind, immobile, and incompetent, society will presumably bear the cost of her lifetime care. In this sense, organ sales pose the same social dangers that justify regulation of drug use, gambling, and other self-destructive activities.

[C] Rights in Human Eggs, Sperm, and Embryos

[1] Genetic Material as Property

The issue of rights in human eggs, sperm, and embryos is particularly complex because such genetic materials have the potential to create a human being. Of course, the likelihood that any particular egg, sperm, or even embryo will successfully develop into a living person is extremely slim. Commentators have advanced three alternative legal approaches to genetic material: (a) treating it as "property," (b) treating it as "life," and (c) according it a middle status of special respect.[47]

Genetic materials are effectively treated as property for most routine purposes, although the property label is infrequently used. Because human beings "own" their bodies, the argument goes, they similarly "own" whatever their bodies produce.[48] Thus, for example, the law permits men to sell their sperm, and allows women to sell their eggs. The legal status of embryos also illustrates the point. Suppose that W and H, a married but infertile couple, contract with an in vitro fertilization clinic to help them produce a child. The clinic will require them to execute advance instructions governing the status of future embryos. Utilizing eggs from W and sperm from H, the clinic creates embryos which are frozen and stored for later implantation in W's uterus. W and H now have decision-making control over the embryos, at least as far as the clinic is concerned, and are thus treated as co-owners. In disputes arising between "parents," on the one hand, and third parties such as clinics or storage facilities, on the other, property law principles provide a tool for resolving disputes.[49]

[2] A Right to Destroy Embryos?

The most challenging legal and ethical issues involve the destruction of embryos. The property law model applies with lesser force in this context.

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[47] *See, e.g.*, John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437 (1990).

[48] *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding that man who stored sperm in sperm bank for future use had "an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction"); *but see* Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (refusing, in same case, to implement agreement among potential beneficiaries of decedent's estate re how decedent's sperm should be allocated, on basis that it is a "unique form of 'property'" that cannot be divided in a manner inconsistent with decedent's intent).

[49] *See, e.g.*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (holding that agreement between embryo storage facility and biological parents that recognized parents' property interest in embryos should be treated as a bailment, such that the facility was required to release the embryos to the parents upon their request).

Suppose W and H—due to divorce, death, or financial difficulties—instruct the storage facility to discard (and thus destroy) the embryos. Acknowledging the decision-making authority of W and H as progenitors, most courts would enforce this directive.[50]

Suppose W and H begin divorce proceedings and disagree about the fate of the embryos. What happens? In *Davis v. Davis*,[51] for example, W sought "custody" of the embryos in order to donate them to an infertile couple; but H, anxious to avoid the financial and psychological burdens of fatherhood, argued that they should be destroyed. The Tennessee Supreme Court concluded that the embryos were neither "persons" or "property," but rather occupied an "interim category that entitles them to special respect because of their potential for human life."[52] Yet the court then proceeded to analyze the rights of W and H in property-like terms. It recognized that both W and H had "an interest in the nature of ownership" in that they had joint decision-making authority over the embryos.[53] Because W and H disagreed, the court reasoned that the outcome hinged on balancing their respective interests for and against procreation. Under this standard, H's interest in avoiding procreation prevailed, in part because W still had the opportunity to achieve parenthood through a future in vitro fertilization procedure.[54]

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[50] *Cf.* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (noting that a joint agreement regarding destruction of embryos would be enforceable as between H and W); *In re* Marriage of Litowitz, 48 P.3d 261 (Wash. 2002) (enforcing agreement between H and W that embryos would be destroyed if not implanted within five years).

[51] 842 S.W.2d 588 (Tenn. 1992).

[52] *Id.* at 597.

[53] *Id.*

[54] *See generally* Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes through the Adversarial Process*, 33 Fla. St. U. L. Rev. 395 (2005).

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Property

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Wolters Kluwer

BAILMENTS

A. Bailments: A bailment is the rightful possession of goods by one who is not their owner.

B. Duty during custody: During the time that the bailee (the person holding the goods) has the object in his possession, he is not an insurer of it. He is liable only for lack of care, but the precise standard depends on who is benefitted:

1. Mutual benefit: If the bailment is beneficial to both parties, the bailee must use ordinary diligence to protect the bailed object from damage or loss.

Example: A hotel which takes guests' possessions and keeps them in its safe is liable for lack of ordinary care, such as where it fails to use reasonable anti-theft measures.

2. Sole benefit of bailor: If the benefit is solely for the bailor's benefit, the bailee is liable only for gross negligence.

3. Sole benefit of bailee: If the bailment is solely for the benefit of the bailee (i.e., the bailor lends the object to the bailee for the latter's use), the bailee is required to use extraordinary care in protecting the goods from loss or damage (but he is still not an insurer, and is liable only if some degree of fault is shown).

4. Contractual limitation: The modern trend is that the parties may change these rules by contractual provisions. But even by contract, the bailee generally may not relieve himself from liability for gross negligence.

a. Acceptance: Also, for such a provision to be binding, the bailor must know of it and "accept" it.

Example: P puts his car into a commercial garage run by D. The claim check asserts that D has no liability for negligence. The provision will be binding only if D can prove that P knew of and accepted this provision — D probably cannot make this showing, since P can argue that he regarded the claim check as merely a receipt.

BAILMENTS CONTINUED

A. What constitutes a bailment: A bailment can be defined as the rightful possession of goods by one who is not their owner. The bailee (the person holding the goods), by virtue of his possession, owes a duty of care to the bailor (the owner). This duty, which varies depending on the circumstances.

B. Creation of bailment: Some cases state that a bailment only arises where the parties make a valid contract for it to exist. However, most courts agree that no formal contract is actually necessary; for instance, consideration is not a requirement. Nonetheless, there are two requirements which must be met before a bailment arises: (1) the bailee must have actual physical control over the object; and (2) he must intend to assume custody and control over it.

1. Physical control: The bailee must come into actual physical control of the bailed property.

a. Parking lot cases: The issue of actual control arises frequently in parking lot cases. If the parking is done by the parking-lot attendant, and the car owner turns over the key, actual control will almost always be found. But in a "park-and-lock" lot, where the car owner parks himself and keeps his own key, most courts have found that the lot never obtains actual control of the car.

i. Presence of attendants: But even in the park-and-lock case, if the lot provides substantial attendant presence, and makes implied or express assurances that security will be maintained, the court may conclude that control has passed to the lot.

C. Rights and duties of bailee: The precise duties owed by the bailee depend upon a number of factors, including who is benefitted by the bailment, how the damage to the bailed property arises, and the presence of any contractual limitations.

1. Duty during custody: During the time that the bailee has the object in his possession, he is not an insurer of it. He is liable for loss or damage occurring to the object only if he is shown to have exercised some lack of care. The precise degree of carelessness which will be required before the bailee is liable, however, traditionally has turned upon who is benefitted by the bailment.

a. Mutual benefit: If the bailment is mutually beneficial to both parties, the bailee must use ordinary diligence to protect the bailed object from damage or loss.

i. What is "mutual benefit": There is usually not much question about whether the bailment is for the bailor's benefit. As to the benefit to the bailee, such benefit of course exists when the bailee makes a charge for the bailment itself. But even beyond this, courts have been quick to find benefit to the bailee if the bailment is done as part of other services being rendered to the bailor, for which the bailor is paying (e.g., a hotel that stores jewelry for hotel guests).

b. Sole benefit of bailor: If the benefit is found to be solely for the bailor's benefit, the bailee is generally held to be liable only for gross negligence.

c. Sole benefit of bailee: Conversely, if the bailment is solely for the benefit of the bailee (i.e., the bailor lends the object to the bailee for the latter's use), the bailee is required to use extraordinary care in protecting the goods from loss or damage. (But even in this situation, the bailee is not an insurer, and some degree of fault must be shown before he will be liable.)

2. Contractual limitations on liability: Bailees, particularly those operating in a commercial context, frequently attempt to modify their duty of care, or the extent of their liability, by contractual provision.

a. Modification of duty of care: Many courts have refused to allow a bailee to contract to exempt himself from liability for his own negligence. But other courts, and the Restatement 2d of Contracts § 195, allow such agreements as long as they do not relieve the bailee from liability for "gross negligence" or "willful and wanton" carelessness.

b. Limitation of liability: Virtually all courts allow the parties to place a contractual limit on the extent of the bailee's financial liability if he does violate the relevant standard of care. However the limitation must be reasonable under the circumstances, and, again, it must not protect the bailee from liability for his willful or gross negligence.

c. What constitutes a contract: Both modification of the standard of care and limitation of liability can only be accomplished by a contract, which of course requires the mutual assent of bailor and bailee. This means that the bailee cannot accomplish either of these goals merely by posting a sign limiting his liability; he must show that the bailor saw and accepted the terms of the sign.

i. Ticket or claim check: Frequently, the bailee prints terms limiting his liability on the claim check, receipt or ticket which is given to the bailor. If the bailee can show that the bailor either was, or reasonably should have been, aware of the terms on the document, the printed terms will be binding. However, it is generally difficult for the bailee to show actual knowledge on the bailor's part, and most American courts have held that one in the bailor's position might reasonably have regarded the document as a mere token for identification purposes, not as a contract. In that event, the terms are not binding, and usual principles of liability apply.