

BAILMENT AND CONTRACT IN ENGLISH LAW TODAY

By A. R. Carnegie*

A great deal has been written on the law of bailment, and in particular on its relationship to the law of contract. It would seem to be well established that its historical development has been quite distinct from the law of contract, and that there was a relatively fully-fledged law of bailment at a stage when the law of contract had hardly achieved an embryonic existence¹. In modern times, there has been no shortage of authority recognising that it has remained a distinct branch of the law². On the other hand, a number of treatises until very recently have defined bailment in terms of contract³. Of these, perhaps the most often quoted is that of Sir William Jones, who defines bailment as "a delivery of goods on trust, on a contract expressed or implied, that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed"⁴.

Questions of history apart, however, there are insuperable obstacles to holding that, as a matter of current common law, the law of bailment is entirely subsumed under the law of contract. The least of these obstacles is perhaps the attitude of the courts in cases where they have been required in interpreting statutes to classify actions arising out of bailment as either essentially contractual or essentially tortious; faced with this choice, they have chosen to regard such actions as sounding in tort⁵. Rather more difficulty is presented by a number of decisions which establish that those who lack the capacity to make contracts are nevertheless capable of becoming bailees; thus a married woman in 1861⁶ could be, and an infant today⁷ can be, convicted of the crime of larceny by a bailee, and an infant's liability in tort in respect of a transaction avoided by the Infants' Relief Act 1871 can be measured with respect to the extent to which the tort complained of was committed outside the purview of what, in spite of the Act, the court regarded as a bailment⁸.

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1. Winfield: *Province of the Law of Tort* (1931), 93.

2. E.g., *R. v. McDonald* (1885) 15 Q.B.D. 323, C.C.R.; *Turner v. Stallibrass* [1898] 1 Q.B. 56, C.A.; *Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, C.A.; *Chesworth v. Farrar* [1966] 2 All E.R. 107; [1966] 2 W.L.R. 1073.

3. E.g., *Blackstone's Commentaries* (6th ed. 1775) ii, 452; *Sir William Jones on Bailments* (2nd ed. 1798), 117; *Story on Bailments* (7th ed. 1863), 3; 2 *Halsbury's Laws of England* (3rd ed.), 94. Among those works which take the contrary view are *Pollock & Wright on Possession* (1888), 160, and *Paton on Bailment* (1952), 36-42.

4. *Loc. cit.*

5. *Turner v. Stallibrass* [1898] 1 Q.B. 56, C.A.; *Chesworth v. Farrar* [1966] 2 All E.R. 107; [1966] 2 W.L.R. 1073.

6. *R. v. Robson* (1861) 31 L.J.M.C. (N.S.) 22, C.C.R.

7. *R. v. McDonald* (1885) 15 Q.B.D. 323, C.C.R.

8. *Ballett v. Mingay* [1943] K.B. 281, C.A. In this case the transaction was actually referred to as the "contract of bailment" (*ibid.*, at 283).

But it is submitted that the crucial difficulty lies in the existence of bailments without consideration, which thereby lack the basic requirement of a parol contract. The sticking-point here is the gratuitous bailment of goods at the request of and for the benefit of the bailor. In the ostensibly gratuitous transaction of *commodatum*, where the bailment is to the advantage of the borrower, there is no difficulty in discovering consideration, on the reasoning of *Bainbridge v. Firmstone*⁹; the bailor, by parting with the goods at the bailee's request, may reasonably be held to have suffered a detriment sufficient to amount to consideration. No similarly convincing argument, however, can be made out with respect to *depositum*, the gratuitous bailment for custody. There is authority for holding that even here, the bailor furnishes consideration by his parting with possession¹⁰; but how can this reasonably be regarded as a detriment when the parting with possession takes place at his own request and to his own exclusive advantage? The modern doctrine of consideration compels the conclusion, contrary to that of *Coggs v. Bernard*¹¹, that the necessity for sufficient consideration, fundamental to the common law notion of contract, excludes some forms of bailment from the law of contract¹².

Although these arguments are conclusive as to the position at common law, it might nevertheless be argued that bailment, while not necessarily contractual by the tests imposed by common law, is essentially contractual by the criteria of analytical jurisprudence. In his classic analysis, Winfield discerned in bailment the voluntary assumption of liability by parties making law for themselves, and regarded this as distinguishing liability for breach of bailment from the paradigm case of liability in tort¹³. This might well be considered not only to make the classification of the liability of a bailee as delictual an unhappy one, but also to demand that such liability be classified as contractual, on the ground that the voluntary assumption of liability by parties making their own law is the essence of any system of contractual obligation. He also preferred, however, to classify the law of bailment as part of the law of property rather than as part of the law of contract or the law of tort, largely because of the importance of the element of possession, the transfer of which is the salient characteristic of the law of bailment. But it is not clear that this should make bailment any less a part of the law of contract than the law of sale, in which the element of conveyance is also of considerable importance¹⁴.

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9. (1838) 8 A. & E. 743; 112 E.R. 1019.
 10. *Coggs v. Bernard* (1703) 2 Ld. Raym. 909; 92 E.R. 107; *Whitehead v. Greetham* (1825) 2 Bing. 464; 130 E.R. 385.
 11. (1703) 2 Ld. Raym. 909; 92 E.R. 107.
 12. Cf. *Story on Bailments* (7th ed. 1863), 4 n.; *Pollock on Contracts* (13th ed. 1950), 140; and Davidge: "Bailment", (1925) 41 L.Q.R. 433, at 438-440. It is generally agreed that an executory agreement to create a gratuitous deposit is not binding, because of the absence of consideration: *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, at 919; 92 E.R. 107, at 113, *per* Holt C.J. Surely the modern theory requires that wherever the performance of an act is good consideration, the promise to do so is equally good consideration?
 13. Winfield: *Province of the Law of Tort* (1931), 99, 100.
 14. Indeed, Winfield's argument would appear to be that the law of sale is also better classified as part of the law of property than as part of the law of contract, because of the importance of the element of conveyance. He regards the case for bailment as being stronger, it seems, only because some bailments are not contracts, whereas every sale is a contract (*Province of the Law of Tort* (1931), 102, 103).

Both the law of property and the law of tort primarily involve the protection of rights *in rem*, which become crystallised into rights *in personam* when infringed, whereas the law of contract deals with rights which are created *in personam*; if the core of the law of bailment is the complex of rights and duties which regulate the relationship of the bailor and the bailee *inter se*, then would it not be more convenient to place the law of bailment in the classification which deals with rights created *in personam*? Bailment may be admitted to be contractual, as Blackstone and Sir William Jones have described it, without postulating that it requires consideration, just as their description of the relationship as requiring a delivery of goods on trust does not imply that the intervention of equity is necessary to give effect to the rights and duties created thereby¹⁵.

It remains to be seen what significance attaches to the distinction, which must be drawn at common law at any rate, between contractual and non-contractual bailments. We are not here concerned with the distinction between a gratuitous bailment and a bailment for reward insofar as it has traditionally been of importance in determining, in the absence of express terms, the standard of care required of the bailee¹⁶. It is not proposed to add anything to the considerable learning on this point, although it will be discussed how far the distinction between gratuitous bailment and bailment for reward is the same as the distinction between contractual and non-contractual bailment¹⁷. Our concern lies with some other less well-explored areas where the extent of the overlap between contract and bailment may be of possible significance in terms of deciding cases, and not merely in terms of classification for analytical purposes.

Where the question at issue is that whether the bailee is under any duty of care as distinct from that of the extent of such a duty, there has not, of course, been any difference between the simple contractual bailment and a simple bailment lacking the essentials of a contract. A gratuitous bailee, as well as a contractual bailee, may be liable in detinue or trover; the bailor may also claim in negligence whether or not there is a contract. The existence of that duty of care which is essential for the tort of negligence is a necessary inference from the fact that a defendant was the plaintiff's bailee in respect of the goods whose loss or damage gives rise to the action. It seems possible that the existence of a bailment would in time past even have provided an escape from the difficulty posed by the doctrine, long since discredited, of *Earl v. Lubbock*¹⁸, which confined a contractor's liability in tort for negligence to a liability to the contractee; thus, even before *Donoghue v. Stevenson*¹⁹ finally laid the ghost of that doctrine, the landlord who negligently failed to take care of his tenant's wife's property entrusted to his care should have failed in any argument that his liability was exclusively to his tenant, as long as he

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15. This particular justification of his definition of a bailment as necessarily contractual is expressly rejected by *Story on Bailments* (7th ed. 1863), 4 n.
 16. *Coggs v. Bernard* (1703) 2 Ld. Raym. 909; 92 E.R. 107. Cf. *Giblin v. McCullen* (1868) L.R. 2 P.C. 317; *Martin v. L.C.C.* [1947] K.B. 628.
 17. See *infra*, pp. 15, 16.
 18. [1905] 1 K.B. 253, C.A.; cf. *Winterbottom v. Wright* (1842) 10 M. & W. 109; 152 E.R. 402.
 19. [1932] A.C. 562, H.L.

could be shown to be his tenant's wife's bailee in respect of the goods, albeit not in any contractual relationship with her²⁰. After *Donoghue v. Stevenson*, it would appear that the application of Lord Atkin's "neighbour" principle may make the notion of bailment as superfluous in satisfying the requirement of a duty of care as it did the alleged necessity to prove a contractual liability. In *Lee Cooper Ltd. v. C. H. Jeakins & Sons Ltd.*²¹ the defendants supplied a truck and driver to collect goods belonging to the plaintiffs. The defendants' contract was not with the plaintiffs, but with another firm under contract with the plaintiffs to have the goods transported. Marshall J. held, *inter alia*, that the defendants were not the plaintiffs' bailees, nor were they in any contractual relationship with the plaintiffs; but he held that nevertheless the defendants, knowing the plaintiffs to be the owner of the goods that they were carrying, were under a duty to the plaintiffs to take proper care of the goods by virtue of the application of Lord Atkin's famous principle.

But although the distinction between a contractual and a non-contractual bailment is thus irrelevant to the primary question whether a duty of care exists, one should certainly expect that, on principle, it should be crucial to any question of liability for express promises varying the duties and rights of the parties. Where a bailee's liability is contractual, that liability can of course be extended or limited by express terms as the parties agree. Where the bailment is unsupported by consideration, however, it would naturally be expected that the bailee's liability could neither be made more extensive nor be limited by an express undertaking. In the former case the bailee's promise and in the latter case the bailor's waiver should be *nudum pactum* and therefore unenforceable, since each is unsupported by consideration. Where the bailee limits rather than extends his liability there is perhaps less difficulty in upholding the validity of his stipulation, since this may be analogous with the freedom of an occupier of land to grant a licence to enter on his land, subject to conditions limiting his liability, without any need for a contract²². There is some authority, however, which suggests that a non-contractual bailee may not only restrict, but may also extend his liability by undertaking to exercise a higher standard of care than that required by the nature of the bailment. In the old case of *Kettle v. Bromsall*²³, Willes C.J. held that it was material in an action in detinue whether the plaintiff delivered goods to the defendant "to be safely kept" rather than to keep as his own. Since no consideration is mentioned, the case would seem to have been one of mere deposit, but one in which it was a question of fact whether the defendant had undertaken a liability more stringent than that of the ordinary deposittee. In the more modern Privy Council decision in *Trefftz & Sons Ltd. v. Canelli*²⁴, a third party signed a contract as a "mere depositary", undertaking to hold certain bills of exchange as security for a debt owed by one contracting party to the other, "until the effective encashment of them". The third party, the defendant in the case, allowed the debtor, in whose favour the bills were drawn, to take them for encashment as they become due. The debtor failed to pay the creditor, who

20. Cf. *Andrews v. Home Flats Ltd.* [1945] 2 All E.R. 698, C.A.

21. [1965] 1 All E.R. 280; [1965] 3 W.L.R. 753.

22. *Ashdown v. Samuel Williams & Sons Ltd.* [1957] 1 Q.B. 409, C.A.

23. (1738) Willes 118, at 121; 125 E.R. 1087, at 1088.

24. (1872) L.R. 4 P.C. 277.

thereupon sued the depositary, claiming that he had failed in an implied undertaking to see that the money received on the encashment of the bills was paid over to the creditor. The Privy Council decided the case in the depositary's favour, but on the ground that he had not been in breach of his liability as expressly undertaken in the contract. If the defendant was, as a mere depositary who had received no consideration for his promise, not bound contractually by his undertaking, the court's essay in construction would seem to have been wasted. The court must have assumed that, even in the case of a wholly gratuitous deposit, the bailee's liability was to be measured by his express undertaking, and not by the duties of a mere depositary as implied by law²⁵.

If, contrary to principle, these authorities are right in their implication that the liability of a bailee may be measurable by his express undertaking even in the absence of consideration, a number of problems of an unusual kind, relating to the overlap of bailment and contract, would seem to arise. In particular, how far do the rules which govern contractual liability govern liability on promises supported by a bailment but not by consideration? The field of most interest would seem to be that covered by exemption clauses. There is already authority to the effect that the *contra proferentem* rule is to be applied to the construction of exclusion clauses in bailments even where their force is not contractual²⁶. Is there also a doctrine of fundamental breach of bailment analogous to that of fundamental breach of contract? Does an act by a bailee amounting to a repudiation of the bailment terminate the bailment and therefore destroy the protection the bailee would have enjoyed from an express exemption clause depending on the continued existence of the bailment for its validity? Since these problems can only arise out of a bailment which lacks the essentials of a contract, it might seem that the problem is excessively academic—gratuitous deposit of goods with exemption clauses stipulated by the bailee must, in the nature of things, be a rare field of litigation. Recent authority, however, by holding that the parties to a bailment are to be ascertained in a different way to that in which the parties to a contract are determined, has suggested that the range of non-contractual bailments, and hence the likely practical importance of the problem, is far wider than might have been supposed.

The case which directly raises this issue is the recent decision of the Court of Appeal in *Morris v. C. W. Martin & Sons Ltd.*²⁷ This case is, no doubt,

25. Cf. *Orchard v. Connaught Club Ltd.* (1930) 46 T.L.R. 214, D.C., which is perhaps distinguishable on the ground that the rules of the club were contractually binding on the plaintiff even apart from the bailment. See also *Sir William Jones on Bailments* (2nd ed. 1798), 43, commenting on *Southcote's Case* (1601) 4 Co. Rep. 83b; 76 E.R. 1061. These authorities, which are cited by the learned contributor of the title "Bailment", 2 *Halsbury's Laws of England* (3rd ed.), 93, at 104, suffer from the weakness that Sir William Jones and Willes C.J. no doubt regarded gratuitous deposit as a contract for good consideration, and were therefore consistent in giving effect to express limitations or extensions of liability by the bailee. This may also explain the Privy Council's treatment of *Treffitz & Sons Ltd. v. Canelli* (1872) L.R. 4 P.C. 277, where the judgment treats the issue as one of breach of contract. This is surprising, in view of the case's closeness in time to *Giblin v. McCullen* (1868) L.R. 2 P.C. 317, in which the court seemed to treat a gratuitous deposit as unsupported by consideration.

26. *Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, C.A. Cf. *Orchard v. Connaught Club Ltd.*, *supra*, n. 25.

27. [1966] 1 Q.B. 716.

already well known for having made superfluous a great deal of learning by overruling the odd case of *Cheshire v. Bailey*²⁸; it has, perhaps, not been so readily noticed that it sets out to explore a relatively unknown dimension of the law of bailment. The plaintiff had sent a mink stole to a furrier for cleaning. The furrier, subcontracting as principal, handed over the stole to the defendants for the actual process. A servant of the defendants, employed to clean the fur, was found to have stolen it. The plaintiff claimed in conversion, alleging that the defendants were vicariously liable for their servant's misconduct. It might be questioned how far it was necessary for the court to explore the law of bailment at such length in order to reach their decision that the defendants were so liable; but in doing so, both Diplock and Salmon L.J.J. held that the relationship between the plaintiff and the defendants was that of bailor and bailee, despite the absence of any privity of contract between them²⁹. They thus held that sub-bailment with the bailor's consent creates a relationship of what may aptly be termed privity of bailment not only between the original bailor and bailee on the one hand and between the bailee and the sub-bailee on the other, but also between the original bailor and the sub-bailee. In reaching this somewhat unexpected conclusion, the learned Lords Justices relied on the nineteenth century Court of Appeal decision in *Meux v. Great Eastern Railway Co. Ltd.*³⁰ and the postwar decision of the House of Lords in *Kahler v. Midland Bank Ltd.*³¹ Both these cases require close examination since, it is respectfully submitted, neither can correctly be regarded as authority for this conclusion.

The defendants in *Meux v. Great Eastern Railway Co. Ltd.* had accepted the plaintiff's goods, carried by the plaintiff's servant in a portmanteau, as the personal luggage of the servant, who had travelled as a passenger on the defendants' line. A servant of the defendants in the course of his employment carelessly damaged the portmanteau by allowing it to fall in the path of a train. The defendants were throughout unaware that the luggage was the property of the plaintiff rather than of her servant, with whom alone they had contracted. The absence of a contractual nexus between the plaintiff and the defendant was held to be no bar to the plaintiff's recovery of damages in tort on account of what was held to be the defendants' misfeasance. Had the Court of Appeal considered the defendants to be the plaintiff's bailees, the same conclusion would, of course, necessarily have followed. In fact, according to the Law Reports, none of the Lords Justices so much as mentioned bailment; and it would seem, from their citation of precedents concerned with liability for injury to passengers, that the law of bailment was not even implicitly part of their reasoning³². Had the court considered

28. [1905] 1 K.B. 237.

29. [1966] 1 Q.B. 716, at 731, 732, *per* Diplock L.J., and *id.*, at 737, 738, *per* Salmon L.J.

30. [1895] 2 Q.B. 387.

31. [1950] A.C. 24.

32. Kay and A. L. Smith L.J.J. relied on *Taylor v. Manchester, Sheffield & Lincolnshire Railway Co.* [1895] 1 Q.B. 134, C.A., while Lord Esher M.R. cited *Foulkes v. Metropolitan Railway Co.* (1880) 5 C.P.D. 157, C.A. It seems clear that the court was merely relying on the point that since the claim was for liability for misfeasance, the absence of a contract was not necessarily an answer to the claim. *Cf. Pollock on Torts* (1st ed.), 432 *et seq.*, and *Brown v. Boorman* (1844) 11 Cl. & F. 1, H.L.; 8 E.R. 1003. The court appears to have ignored the difficulty raised by *Winterbottom v. Wright* (1842) 10 M. & W. 109; 152 E.R. 402 (*supra*, n. 18).

the defendants to be bailees of the plaintiff's goods, they would, on the reasoning of *Morris'* case itself, have been bailees for reward, and liable for ordinary negligence; surely it is hardly conceivable that the court, had they been willing to decide the case on this simple ground, should have remained silent on the point and discussed the question of misfeasance at such length. It is submitted that *Meux v. Great Eastern Railway Co. Ltd.* must, if anything, be *sub silentio* authority for the view that a sub-bailee, although liable to the owner for the loss of the owner's goods, is not liable as a bailee, but by virtue of a duty of care arising otherwise.

Kahler v. Midland Bank Ltd., the second case on which the Lords Justices chiefly relied in *Morris'* case, would seem to be even more strongly opposed to the conclusion for which it was cited as authority. In this complicated case, the defendants were bailees of the plaintiff's bank in Czechoslovakia in respect of some share certificates of which the plaintiff was the owner, but which he had bailed to the bank in Czechoslovakia. The defendants refused to deliver the securities to the plaintiff at his demand, relying on the circumstance that it was illegal under Czechoslovakian law for the plaintiff's bank, the defendants' immediate bailors, to hand over the securities to the plaintiff. In coming to the conclusion that the law governing the transaction was Czechoslovakian law, the noble Lords discussed at length the effects of the head bailment and the sub-bailment as creating the relationship of bailor and bailee between the plaintiff and the bank in Czechoslovakia, on the one hand, and between the bank in Czechoslovakia and the defendants on the other; but nowhere did they suggest, what would have been of the utmost relevance had it been true, that the defendants were the plaintiff's bailees. Had the majority, who dismissed the plaintiff's appeal, considered the defendants to be the plaintiff's bailees, it would surely have been necessary for them to consider whether the proper law of the extended bailment between the parties to the action might not have been different from the proper law of the head bailment, which was held to be decisive. But the fundamental inconsistency of *Kahler v. Midland Bank Ltd.* with the *Morris'* case concept of extended bailment appears most clearly from the dissenting judgments. If there had been such a bailment, Lord MacDermott and Lord Reid, who dissented in the plaintiff's favour, would have been only too anxious to discover its existence. However, they both expressly denied the existence of such a bailment; and Lord Reid regarded his conclusion on this point as being in agreement with that of the majority³³.

But although it is the present submission that the authorities on which Diplock and Salmon L.JJ. relied in *Morris'* case do not carry the point for which they were cited, it is arguable that House of Lords authority could be found for their conclusion in a case cited, as it happens, by Lord Denning M.R., who did not expressly adopt the concept of extended bailment³⁴. In

33. [1950] A.C. 24, H.L., at 38 *per* Lord MacDermott, and *id.*, at 46, *per* Lord Reid.

34. [1966] 1 Q.B. 716, at 730. Lord Denning M.R. approved the statement of the law relating to sub-bailment in *Pollock & Wright on Possession* (1888), 169: "both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the sub-bailment". This would seem to lead to the same results as the view of Diplock and Salmon L.JJ., provided that the sub-bailee's rights against the original bailor were also the same as his rights against his immediate bailor.

the notorious case of *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.*³⁵, the plaintiffs-respondents shipped a cargo by a ship chartered by the Elder Dempster line from the owners, the Griffiths Lewis Steam Navigation Company. The cargo was damaged owing to bad stowage. The bill of lading, which constituted a contract between the plaintiffs and the Elder Dempster Company, protected the company from liability for bad stowage. The House of Lords held that the shipowners, although not parties to this contract, were nevertheless protected by its exemption provisions. It seems that this case is nowadays to be explained on the ground that the shipowners were the bailees on terms of the plaintiffs' cargo with respect to the plaintiffs, notwithstanding that the charterers were the only parties with whom the plaintiffs had contracted³⁶. If the charterers were the plaintiffs' bailees and the shipowners the sub-bailees, then the *Elder Dempster* case would seem to be authority for the concept of the extended bailment as developed in *Morris'* case.

Since the *Elder Dempster* case appears to provide the best pedigree for the concept of the extended bailment, it is hardly surprising that the most interesting implications of the concept lie in the field of the effect of the doctrine of privity of contract on exemption clauses. Cases such as *Cosgrove v. Horsfall*³⁷, *Adler v. Dickson*³⁸ and *Midland Silicones Ltd. v. Scruttons Ltd.*³⁹ illustrate the difficulty posed by the doctrine of privity of contract to a contractor who wishes to negotiate the same protection for those who must vicariously perform his contractual obligations as he can negotiate for himself. *Midland Silicones Ltd. v. Scruttons Ltd.* shows, in particular, that it is equally difficult for the vicarious performer to negotiate this protection himself when he has no opportunity to deal directly with the customer of the party with whom he has contracted. If, as has been suggested above^{39A}, a bailee's limitation of liability, or even his assumption of increased liability with respect to standard of care, does not require inclusion in a contract in order to be valid and enforceable, and if the concept of extended bailment linking an original bailor to an ultimate sub-bailee is good in law, it would appear that a sub-bailee, at any rate, is at an advantage in the facility with which he may circumvent the disadvantages of the doctrine of privity of contract. If A contracts with B that B will ship A's goods, and B, acting within his authority as bailee, bails the goods to C by a separate contract in the course of fulfilling his duty under his contract with A, and that separate contract furthermore provides for the limitation of C's liability to B or B's bailor, it seems to be clear law that C will still be liable to A, the exemption clause notwithstanding, insofar as his attempt to limit his liability by contract is concerned. For unless B contracted with C

35. [1924] A.C. 522, H.L.

36. [1924] A.C. 522, H.L. at 564, *per* Lord Sumner. Lord Sumner's remarks were regarded as the *ratio decidendi* by Dixon C.J. and Fullagar J. in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (1956) 95 C.L.R. 43, at 52 and 69 respectively. Lord Denning M.R. in *Morris v. C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716, C.A., at 730, regarded this view of the *ratio decidendi* of the *Elder Dempster* case as having been adopted by the House of Lords by virtue of the express approval of Fullagar J.'s judgment by Viscount Simmonds in *Midland Silicones Ltd. v. Scruttons Ltd.* [1962] A.C. 446, H.L., at 472. *Cf.* also the speech of Lord Keith of Avonholm, *id.*, at 480.

37. (1945) 62 T.L.R. 140, C.A.

38. [1955] 1 Q.B. 158, C.A.

39. [1962] A.C. 446, H.L.

39A. See *supra*, p. 10.

as agent for A, there will be no privity of contract between C and A, and A cannot be prejudiced by a contractual stipulation between C and B, to which he, A, was not a party. But if the result of the transaction described is, according to the doctrine of *Morris'* case, to create the relationship of bailor and bailee between A and C, then C will be able to rely on the exemption clause as a term of this bailment, since a bailee may limit his liability to the bailor without making a contract to that effect.

If this reasoning is correct, some ingenuity may be called for in dealing with the authorities. The *Elder Dempster* case would cease to present difficulty as an all-but-overruled decision of the House of Lords. The *Midland Silicones* case might indeed appear the more anomalous decision, only to be explained on its particular facts as turning on the trial judge's finding that the defendants in that case were not bailees "whether sub, bald or simple"⁴⁰. A case such as *Barratt v. Great Northern Railway Co.*⁴¹, a through-transit railway case dealing with the carriage of goods, which upheld an exemption clause operating beyond the ambit of contractual privity, would become, like the *Elder Dempster* case, merely a standard illustration of the effect of an extended bailment; unfortunately, a similar case such as *Hall v. North Eastern Railway Co.*⁴², dealing with carriage of passengers, would remain a problem, although the courts which decided these two cases seem to have regarded them as resting on no different principles. The problems of distinguishing authority would not necessarily be confined to cases dealing with exemption clauses: *Köhler v. Midland Bank Ltd.* might well need to be distinguished as having been decided *per incuriam*, on the grounds that the House of Lords did not consider the possible relevance of the proper law of the extended bailment⁴³; whereas cases such as *Meux v. Great Eastern Railway Co. Ltd.* and *Lee Cooper Ltd. v. C. H. Jeakins & Sons Ltd.* would have to be explained as cases where the courts made unnecessarily heavy weather of what were basically simple problems of bailee's liability⁴⁴.

In addition to its advocacy of the extended concept of bailment, *Morris'* case poses, not for the first time, a problem of terminology which is directly relevant to the question of the demarcation of the respective spheres of bailment and contract. For those authorities who regard the law of bailment as entirely a branch of the law of contract, the distinction between gratuitous bailment and bailment for reward is necessarily a division between two types of contractual bailment⁴⁵. It might have been expected that the realisation that some undoubted bailments were not contracts because of the absence of consideration would have been accompanied by the adoption of the distinction between gratuitous bailments and bailments for reward as the boundary between those bailments which were and those which were not contracts.

40. [1959] 2 Q.B. 171, at 189; [1962] A.C. 446, H.L., at 470.

41. (1904) 20 T.L.R. 175, D.C.

42. (1875) L.R. 10 Q.B. 437. These cases were cited by Lord Denning in his dissenting judgment in the *Midland Silicones* case, [1962] A.C. 446, H.L., at 485. But it is respectfully submitted that Lord Denning's interpretation of these cases, which is adopted in the text, is open to doubt.

43. See *supra*, p. 13.

44. See *supra*, pp. 10, 12, 13.

45. See *supra*, n. 3.

Indeed, this would seem to be the view of some textbook writers⁴⁶. But the Lords Justices in *Morris'* case who held that the defendants were the plaintiff's bailees also held that they were bailees for reward of the plaintiff's mink stole, although no relationship of privity of contract existed between the plaintiff and the defendants. It follows that a bailee for reward is not simply a bailee for good consideration in the sense in which this term is used in the law of contract. In the language of the law of contract, a bailee for good consideration should be a bailee whose obligation is to a party from whom consideration moves; but the bailor in the extended bailment in *Morris'* case provided no consideration within the contract to which the bailee was a party. Admittedly, the bailor had furnished consideration within another contract, but even this does not appear to be necessary, as the Court of Appeal decision in *Andrews v. Home Flats Ltd.*⁴⁷ demonstrates; there the bailor, the tenant's wife, had furnished no consideration whatever, but the defendant was nevertheless held to be bailee of her goods for reward. No doubt a bailee for reward must receive consideration from someone, who may or may not be the other party to the bailment; but this is clearly a looser and less precise concept than that of consideration in the law of contract.

This problem of terminology, however, can hardly loom large in any final assessment of the importance of the contribution of *Morris'* case to the law of bailment and the delimitation of the respective areas of contract and bailment. It is otherwise, however, with regard to the doctrine of the extended bailment. The effect of this doctrine seems to be to create a concept of privity of bailment wider not only than that of privity of contract, but also wider than that of privity of estate in the law of real property, where an assignee of a lease has privity of estate with his lessor, but a sub-lessee does not. In *Tappenden v. Artus*⁴⁸, which was cited with approval by all the Lords Justices in *Morris'* case, Diplock L.J. had occasion to emphasise the importance of the distinction between the situation where A entrusts B with goods with authority for B to bail them to C, and that where A entrusts B with goods as A's agent with authority to bail them to C so as to create a contract between A and C; but *Morris'* case threatens to obscure what may well be an equally useful distinction between the two situations abovementioned where there is in neither case any question of contract. Even where no contract is in question, it should be possible to distinguish between the effect of a bailment made by B as bailor to C as bailee, when B is acting under authority he possesses as A's bailee, and the effect of a bailment by A to C for which B is a mere intermediary to negotiate the arrangement and to carry out the delivery. In the former case, a true sub-bailment, B is A's bailee, while C is B's bailee; in the latter case, B may originally be A's bailee, but is superseded as such by C. Surely it is undesirable to add unnecessary complexity to the former situation by holding that both C and B are A's bailees, and that both A and B are C's bailors. Any advantage which might be gained in providing a loophole for the enforcement of reasonable exemption clauses is surely not worth, for instance, the increased peril to a bailee who is the ultimate bailee in a chain of sub-bailments from the estoppel which precludes him from denying his bailor's title.

46. *Chitty on Contracts* (22nd ed. 1961) ii, s. 152; Atiyah: *Introduction to the Law of Contract* (1961), 66, 67.

47. [1945] 2 All E.R. 698.

48. [1964] 2 Q.B. 185, C.A., at 196.

Morris v. C. W. Martin & Sons Ltd. would seem to be an outstanding example of the judicial recognition that the law of bailment is not confined within the boundaries of the law of contract. Although the form taken by this recognition in that case at first sight seems to promise to bear some fruit in enabling some of the inconveniences of the law of contract to be avoided, the difficulty of reconciling its particular exploration of the law of bailment with principle and authority may prove fatal to its future development. In any event, the inconveniences of the doctrines of privity of contract and privity of consideration may, it is to be hoped, be mitigated as a result of the newly-grasped freedom of the House of Lords to refuse to follow precedent in the interests of justice⁴⁹. There is surely more prospect that these problems may be overcome by a radical reassessment of the whole doctrine of privity of contract in the exercise of this new freedom than by the exploitation of the distinctions between the concepts of contract and bailment.

49. See [1966] 3 All E.R. 77; [1966] 1 W.L.R. 1234.