SOME ASPECTS OF THE LIABILITY OF BAILEES IN TORT.

By R. W. BAKER, B.C.L. (Oxon.), B.Litt. (Oxon). LL.B. (Tas.)
Professor of Law in the University of Tasmania.

The intention in this brief article is to touch shortly upon some only of the rules relating to the tortious liability of bailees. No particular pattern has been followed; some points have been seized upon because they are controversial, others simply because they were of interest to the writer. No claim is made that upon any of the issues raised is the treatment exhaustive.

Our starting point must necessarily be—what is a bailment? The answer to this question in simple terms is that a bailment is constituted by the act of an owner or possessor of goods (bailor) transferring the possession of those goods to another person (bailee) upon the understanding that the goods shall be re-delivered as soon as the time or condition on which they were transferred has elapsed or been performed. In the great majority of cases of bailment there is a contract between bailor and bailee, but a bailment can exist without a contract.

There are many different kinds of bailments, the present classification of which depends largely on the early case of *Coggs v. Bernard.*[1] An analysis of the classic judgment of Holt C.J. in that case establishes that substantially bailments can be classified as follows—

(1) Gratuitous bailments.
   (*a*) Bailments in which the *bailor* receives free services from the bailee in connexion with the chattel bailed. For example, goods are deposited with the bailee to be looked after by him free of charge.[2]
   (*b*) Bailments in which the *bailee* receives free the use of a chattel; that is, a gratuitous loan for use, as in the loan of a motor-car for a day or a week.
(2) Bailments for reward.
   (*a*) Bailments in which the *bailor* pays for the safe keeping of a chattel; for example, the garaging of a car.
   (*b*) Bailments in which the *bailee* pays for the use of a chattel; for example, the hire of a car.
   (*c*) Bailments in which the *bailor* pays for services rendered to a chattel by the bailee; for example, the dry-cleaning of clothes.

To these two main subdivisions can be added a third, those known as involuntary bailments. Strictly speaking, such a phrase is a contradiction in terms because, as has already been stated, to constitute a bailment the legal possession of a chattel must pass from the bailor to the bailee and legal possession does not generally pass to a person who is either indifferent to or opposed to the transfer of physical possession. Thus, if a trading concern sends unsolicited goods to A and A exercises no dominion over them nor in any way interferes with them, no real bailment arises. This is pointed out by Abbott L.C.J. in *Lethbridge v. Phillips.*[3] Where property has been left at houses by mistake, he said, the parties could not be

1. (1703) 2 Ld. Raym. 909.
2. See *Munro v. Willmott,* [1949] L.J.R. 471.
3. (1819) 2 Stark. 544, 545.

considered as bailees of the property without their consent. But since the term has come to be used both in the reports[4] and in text-books to cover this kind of situation, it justifiably can be used here.

Thus for the present purposes bailments can be divided into three classes, involuntary, gratuitous and for reward. Most of the matters to be discussed below are connected with the first kind but there is some treatment of the other two.

Involuntary bailments arise in the main from two sets of circumstances: firstly, where goods are sent to a person without his knowledge or request; and secondly, where goods are delivered to a carrier wrongly addressed and the carrier finds the goods on his hands when the addressee refuses to accept delivery. The immediate problems are concerned with the former. How stands in the eyes of the law the unwilling receiver of unsolicited goods—the person to whom goods are sent by mistake or "on approval," the producer to whom budding playwrights send their plays, the publisher who receives the aspiring author's manuscript? At the outset it is necessary to enter a caveat. The cases on this topic are not numerous; some are very old and briefly reported. Opinions therefore will vary and it will not surprise the present writer if some of his conclusions are disputed; indeed, should that happen it will be a cause for satisfaction, for after all, the object of such an article as this is to stimulate independent thought and reasoning.

The first point is this—the involuntary bailee is under no liability for the *safe custody* of the unsolicited chattel. If it is lost or damaged accidentally or even through negligence he cannot be held responsible to the sender. So in *Howard v. Harris*,[5] a theatrical producer who lost the manuscript of a play which had been sent to him without his request was held not liable when sued by the playwright. Likewise in *Lethbridge v. Phillips*,[6] the defendant to whose house a valuable miniature was sent without any previous communication was held not responsible when it was damaged through being placed on a mantlepiece near a large stove. This rule means that an involuntary bailee cannot be sued for the loss of the chattel either in negligence or in detinue, not in negligence because being not strictly a bailee he owes the sender no duty of care for its safe custody, not in detinue because "detinue does not lie against him who never had possession"[7] and as explained above the involuntary bailee does not have legal possession of the chattel provided he exercises no dominion over it. In other words, if he simply does nothing, the law places on him no responsibility. But, of course, if he wilfully damages or destroys the chattel he will be liable. He cannot, for example, throw it out into the street.[8]

So far we have been considering the position of the receiver of unsolicited goods who takes no action at all with respect to them. The situation changes radically as soon as there is any assumption of control over the goods, for then the receiver becomes a depositary with all the

4. See, for example, Kelly C.B. and Martin B. in *Heugh v. London & N. W. Railway Co.*, (1870) L.R. 5 Ex. 51, 56 58.
5. (1884) 1 Cab. & E. 253.
6. n. 3, *supra*.
7. Parke B. in *Jones v. Dowle*, (1841) 9 M. & W. 19, 20. But detinue does lie against a person who once had possession but has improperly parted with it.
8. Bramwell B. in *Hiort v. Bott*, (1874) L.R. 9 Ex. 86, 90.

responsibilities of a gratuitous bailee, including liability for negligent loss or damage. This proposition is well exemplified by the case of *Newman v. Bourne and Hollingsworth.*[9] The plaintiff, visiting the defendants' shop to buy a coat, took off her own coat which was fastened by a diamond brooch and put it on a glass case with the brooch beside it. When leaving the shop she forgot the brooch. Had the brooch been left where it was the defendants might well have been absolved from any responsibility, but because the defendants' servants took possession of it, the defendants were held liable for negligence when it was lost.[10]

Taking possession of the goods is only one mode of exercising control over them. Obviously, sale is another and would in most cases give rise to the additional remedy of an action for conversion. In most cases, it is said, because in a very restricted field the doctrine of agency of necessity applies. The limits of this doctrine have been pointed out by Lord Goddard L.C.J. in the recent case of *Sachs v. Miklos*[11] where he said that the courts would be slow to increase the classes of those who could dispose of other people's goods without the authority of the owners and that in any event there must be a real emergency. Applying this principle, the involuntary bailee would doubtless have a perfectly good defence if, having perishable goods on his hands, he sold them ;[12] but if the goods were not perishable and he disposed of them because, for example, they were an inconvenience, he would find himself liable in an action for conversion.

But, as we have seen, actual sale is not essential to make the involuntary bailee who handles the goods liable. Constituted a true bailee by his handling, *mis-delivery* of the goods will in many cases be sufficient, either because there is negligence in handing over the goods or because by interfering with the title or documents of title to the goods, he converts them.[13] This is the effect of the well known cases of *Hiort v. Bott*[14] and *Elvin & Powell v. Plummer Roddis*,[15] in both of which the facts were very nearly the same. In the former the plaintiffs, acting on a telegram received from their agent, consigned a quantity of barley to the defendant, sending him a delivery note which made the barley deliverable to his order or that of the plaintiffs. In actual fact the defendant had ordered no barley. The agent called on him the next day, told him that there had been a mistake and prevailed on him to endorse over the delivery note to the agent who then collected the barley from the carriers, sold it and absconded with the proceeds. The defendant was held liable in conversion. Salmond [16] queried the correctness of this decision, asking whether there was in fact any act of wrongful interference and was not an involuntary bailee entitled to return the goods to the owner, owing him only a duty of reasonable care. The present writer is of the opinion

9. (1915) 31 T.L.R. 209.
10. The plaintiff's claim was for negligence. It could equally have been for detinue because a bailee who negligently allows goods to be stolen from him while in his possession is liable in detinue. But not for conversion. See Salmond (10th ed.), pp. 284-5.
11. [1948] L.J.R. 1012, 1015.
12. He would of course have to account to the owner for the proceeds.
13. These principles apply both to the receiver of unsolicited goods and also to the carrier who finds goods on his hands because wrongly addressed.
14. (1874) L.R. 9 Ex. 86.
15. (1933) 50 T.L.R. 158.
16. See p. 317, note (n) of 8th edition.

that the decision was sound and stresses the point already made that in such circumstances there are two questions to consider: firstly, was there a conversion by the defendant arising from an interference either with the property in or the right to possession of the goods; secondly, was there any negligence as a bailee by the defendant in handing over the goods? In the instant case the defendant, by endorsing the delivery note, transferred the title to the possession of the barley to an unauthorised person and was thereby guilty of conversion. The question of negligence as a bailee was not pursued.

This analysis of the position is borne out by the second case mentioned above, *Elvin & Powell v. Plummer Roddis*.[17] The facts were as follows: A man went into the London warehouse of the plaintiffs and ordered £350 worth of coats to be sent to the Brighton branch of the defendants, and this was duly done. After leaving the plaintiffs' premises the man sent a telegram to the defendants saying that the goods had been despatched in error and that a van would be sent to collect them. The man then called on the defendants, obtained the coats and absconded—a similar piece of roguery to that in *Hiort v. Bott*. The plaintiffs thereupon brought an action against the defendants for conversion and for negligence. During the course of the case, plaintiffs' counsel admitted that there was no evidence of any intention on the part of the defendants to deny the plaintiffs' right to the goods or to assert any right inconsistent with that right and therefore the claim for conversion could not be sustained. When the jury at the conclusion of the evidence found that the defendants had not been guilty of any negligence in parting with the goods, both grounds of the plaintiffs' case failed and judgment was entered for the defendants.

Summing up so far: If the involuntary bailee does nothing, he is not responsible if the unsolicited goods are lost or destroyed. If he decides to return the goods, he is not liable for their loss provided he was not guilty of any negligence in handing them over and provided he did not interfere with the right to the possession or title of the goods. What is his liability if he hands the goods to his servant either for safe custody or for return to the owner? Taking the former case first, it seems clear that if the goods are lost or stolen, the master will not be held responsible if he is able to prove that a reasonably prudent man would in similar circumstances have entrusted that article to that servant.[18] In the latter case, that is, where the master delivers the goods to the servant to return to the rightful owner, it is necessary as the law stands to distinguish between the cases of negligent loss and theft. For negligent loss by the servant in the course of employment it would appear that the master will be responsible.[19] What of theft by the servant? The answer is that the master will not be liable provided he used due care in selecting that servant. This is the effect of *Cheshire v. Bailey*[20] *and Mintz v. Silverton*[21]

17. And see also *Heugh v. London & N. W. Railway Co.*, (1870) L.R. 5 Ex. 51.
18. *Makower, McBeath & Co. v. Dalgety & Co.*, [1921] V.L.R. 365; *City of Fitzroy v. National Bank of Asia*, (1890) 16 V.L.R. 342: *Bullen v. The Swan Electric Engraving Co.*, (1907) 23 T.L.R. 258. Contrast the bailee for reward who in the absence of special terms undertakes that all reasonable care will be exercised by himself and his servants. *Paterson* v. *Miller*, [1923] V.L.R. 36.
19. *Elvin & Powell* v. *Plummer Roddis, supra. Abraham v. Bullock*, (1902) 86 L.T. 796, does not help on this point because there the defendant was a bailee for reward.
20. [1905] 1 K.B. 237.
21. (1920) 36 T.L.R. 399.

in both of which bailees for reward were held not responsible for theft by a servant of the goods bailed. How much more so would that principle apply to gratiutous bailees.

To conclude this article, it is intended to discuss briefly the question just mentioned of the responsibility of a bailee for reward for the theft of the bailed goods by his servant. For *negligent* loss by his servant in the course of employment he is liable[22] and also for theft due to his own negligence. But for a theft which occurred without lack of care by the master personally he will apparently not be held responsible.[23] There would appear to be some difficulty in reconciling in principle these two rules. If vicarious liability is imposed on a bailee for reward for negligence in his servant why not for fraud or theft in view of the decision in *Lloyd v. Grace, Smith & Co.*,[24] which held that a principal is liable for the fraud of his agent whether for the benefit of the principal or not provided the agent was acting within the scope of his employment ? If in *Abraham v. Bullock* the negligent loss of the jewellery by the coachman was held to have occurred within the course of employment, why not the dishonest loss in *Cheshire v. Bailey* ? But any doubt as to the latter decision did not seem to occur to Lord Shaw in *Lloyd v. Grace, Smith & Co.*[25] nor to Lord Reading L.C.J. in *Mintz v. Silverton* despite the argument by counsel that *Cheshire v. Bailey* had been affected by *Lloyd v. Grace, Smith & Co.* " In cases of that kind," said Lord Reading,[26] " you have the fraudulent servant put in a position of authority by the employer and the person defrauded brought into contact with the servant by the act and on the representation of the employer and the fraud committed by the servant acting within the bounds of that representation." Counsel then submitted that the case before his Lordship answered those tests, but Lord Reading L.C.J. disagreed, saying that where a servant committed a crime for his own benefit he thereby severed his connexion with his employer so as to absolve the employer from responsibility unless he had held out the servant as having authority to do the act. Perhaps this latter clause provides the clue to the distinction between the two cases. In *Lloyd v. Grace, Smith & Co.* the fraud was committed in the course of transactions of a kind which the employer held out the dishonest servant as having authority to conduct, whilst in *Cheshire v. Bailey* the theft by the servant was an act lying completely outside the scope of the servant's normal activities. If this is not the explanation, maybe the suggestion put forward by Dr. Hanbury[27] that cases of bailment fall outside the general principle as to vicarious liability propounded in *Lloyd v. Grace, Smith & Co.* contains the true answer. Whatever the explanation, it can, I think, be taken as established law that a bailee for reward in the absence of personal negligence will not be held responsible for the thefts of his servants.

22. *Abraham v. Bullock*, (1902) 86 L.T. 796.
23. *Cheshire v. Bailey*, n. 20, *supra*.
24. [1912] A.C. 716.
25. See at p. 741.
26. at pp. 400-401.
27 *Essays in Equity*, 150-3.