Washington University Law Review

Volume 11 | Issue 4

January 1926

The Definition of Bailment

Charles E. Cullen
Washington University School of Law

ST. LOUIS LAW REVIEW

Vol. XI Published Quarterly During the University Year by the Undergraduates of Washington University School of Law. No. 4

THE DEFINITION OF BAILMENT

By Charles E. Cullen.*

Recent discussions of the proper juristic conception of rights, duties, and liabilities have brought into prominence the conflict between two theories. One holds that they are the incidents of a relation, the other, which has been accepted for several centuries, that they are the results of express undertaking, voluntary wrong doing, or culpable action. The advocates of the relationship doctrine go back to the Year Books and in the feudal element and its contribution to the English common law find status as the source of many of the rights and duties, rather than the compact of individuals: "Anglo-American law is pervaded on every hand by the idea of relation and of legal consequences following therefrom."[1] The nineteenth century deduction of law from a metaphysical principle of individual liberty—itself a culmination of the mental attitude beginning with the Puritan contests with the crown —is blamed for the ill repute into which status, as an institution, fell. The resulting strength of contract as a source of rights, duties and liabilities in modern law is, therefore, according to the advocates of the relationship doctrine, an unnatural and illogical development and to support that view it is claimed "the whole course of English and American law today is belying it, unless indeed we are progressing backward."[2] To support the movement back to status we find cited chiefly the regulation of the duties of insurance companies and public service corporations and the workmen's compensation acts.

*Professor of Law, Washington University School of Law.

1. Roscoe Pound, The Spirit of the Common Law, p. 22 et seq.
2. Ibid. p. 28.

Contrasted with the above view, it has been indicated[3] that there might not be the sharp distinction between the contract and relationship ideas. This view suggests a recurrence in cycles of certain changes which are brought about by the three instrumentalities of adjustment, Fictions, Equity, and Legislation, originally advocated by Sir Henry Maine in his Ancient Law, and is further elaborated in "The Schools of Jurisprudence, Their Places in History and Their Present Alignment."[4] Following the latter reasoning it would seem that changes come about to cure abuses which develop when a single viewpoint, such as that of status, produces a uniformity that is stifling individual or group development. On the other hand, when freedom of contract results in relations so individualized that there is no uniformity of rights, duties, or obligations, legislation is likely to be called upon as a standardizing agent. Such would be the statutory regulation of public utilities, insurance, and workmen's compensation acts.

Which school of thought shall we follow in defining bailment? Undoubtedly a large portion of bailment transactions were originally governed by rules of status, particularly when the bailee was following a public calling.[5] The recognition of bailments as such was, however, apparently first limited to those arising out of agreement, and Ames has pointed out that it was because of the limitation of bailment to relations arising out of contract that detinue was not available as a remedy to the loser of chattels against the finder, his remedy for a refusal to surrender the goods being in trespass.[6]

It has been suggested that those relationships which are in their natures undertakings but which are not included in tort or contract would have formed a third grand division to include at least public undertakings and gratuitous undertakings. "Bailments, however, were after a struggle drawn off into the division of contracts; and a few other cases of undertakings then known, not being of sufficient importance to form a separate division, either followed bailments, or with other actions on the case sank back into the division of torts."[7]

Are we to follow the conclusions of students of jurisprudence concerning the importance of status in the feudal period, and pass by the impress made by contract during the recent centuries as illogical and

3. Nathan Isaacs, The Standardizing of Contracts, 27 Yale Law Journal, 34 et seq.
4. 31 Harvard Law Review, 373.
5. O. W. Holmes, Jr., The Common Law, Lecture 5.
6. James Barr Ames, The History of Trover, Vol. 3, Select Essays in Anglo-American Legal History, 417.
7. Jos. H. Beale, Jr., Gratuitous Undertakings, 5 Harvard Law Review, 222.

ephemeral? Has there not come about a change so permanent that, to satisfactorily meet the needs of practice, the modern conception and not the historical one must be embodied in a definition? Is it not true that as indicated in the quotation supra, bailments passed into the field of contract and have remained there? The difficulty of accurate definition and the differences in opinion of what a definition should include, are pointed out by Schouler[8] and Story.[9] It does not seem proper to eliminate from a proper definition all reference to the contractual nature of bailments. The difficulties arise from two sources. One is the confusion arising from varying ideas of consideration; the other, from the inclusion in the bailment class of the small group of transactions embracing chattels found when lost or mislaid, or deposited by natural forces.

In the great majority of bailment transactions the contractual nature of the undertaking and the presence of consideration is evident, but in gratuitous bailments the presence of consideration is not so apparent. It has been asserted that there is no consideration present in such transactions because the party benefited surrenders no legal right. This view is based on the conception of consideration which requires that there be some "act or forbearance given in exchange for a promise"[10] before we can have a contract or an enforceable contractual obligation. It is, accordingly, maintained that the property rights are inherent in gratuitous bailments by reason of status or relation rather than as attributes of contract.

We may acknowledge that much of the doctrine of consideration had its origin in a procedural basis and that the similarity of remedy in contract and quasi-contract during the development of assumpsit led lawyers to believe that where assumpsit lay a contract must be found and consideration must be present.[11] Also we may acknowledge that because of this it was easy to assimilate gratuitous undertakings, really enforceable by quasi-contractual procedure, into the group of bailments arising out of express or implied contract. That they were so assimilated is shown by such efforts as that of Lord Holt. "But secondly, it is objected, that there is no consideration to ground this promise upon and, therefore, the undertaking is but a *nudum pactum.* But to this I

8. James Schouler, A Treatise on the Law of Bailments (1880), p. 2.
9. Joseph Story, Commentaries on the Law of Bailments (9th Edition) Sec. 1.
10. Ames, Two Theories of Consideration, 12 Harvard Law Review, 515, l. c. 531; 13 Harvard Law Review, 36.
11. W. S. Holdsworth, Debt, Assumpsit and Consideration, 11 Michigan Law Review, 347.

answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."[12] But regardless of how the doctrine of consideration widened, the last few centuries have seen it accepted and adapted by bench and bar until its place is firmly fixed. As a doctrine it is neither irrational nor illogical. "The old definitions and tests are not wide enough to cover all cases of just obligation arising from a promise.—The conflict of authortity on this secondary aspect of consideration shows that legal detriment, 'as a universal rule of thumb which may be applied blindly and mechanically to test the sufficiency or value of consideration', has broken down."[13] Usage and practice have recognized a consideration in gratuitous undertakings for the benefit of one or the other party as arising from the surrender of the possession of the chattels. The obligation based on the property right arising out of the relation and enforceable by an action in trespass disappeared when the action of detinue sur trover was allowed when findings were being assimilated into the bailment class.

The rights and obligations of the loser and finder and of the owner and involuntary depositary are recognized today as similar to those of bailor or bailee. The obligation to return the goods or account for their conversion or for the results of some degree of negligence exist in these transactions. The action to enforce this obligation has been classified with those of customary duty and enforceable by an action in quasi-contract.[14] This is not conceding that customary duty is one of relationship or status. It does not require an hypothesis that there is a status of loser and finder but one of duty imposed by law on the finder because of his own action. In Burns v. State,[15] in which one who had picked up money thrown away by an insane fugitive and had failed to account for it, was held rightly convicted of larceny as bailee, it is said, l. c. 380, "the mutuality essential to the contractual feature may be created by operation of law as well as by acts of the parties with intent to contract. So it makes no difference whether the thing be entrusted to a person by the owner, or another, or by some one for the owner, or by the law to the same end. Taking possession without present intent to appropriate raises all the contractual elements

12. Coggs v. Bernard (1907), 2 Ld. Raymond 909, l. c. 919, 92 Eng. Rep. R. 113.
13. Henry W. Ballantine, Is the Doctrine of Consideration Senseless and Illogical? 11 Michigan Law Review, 424.
14. Ames, History of Assumpsit, Vol. 3, Select Essays in Anglo-American Legal History, 293.
15. (1911) 145 Wis. 373; 128 N. W. 987; 140 Am. St. Rep. 1081.

essential to a bailment." In Leonard v. State,[16] in which a constable who, on arresting a person, had taken from him a sum of money and converted it to his own use, was rightly held convicted of larceny as bailee, it is said, "it is the universal rule that a bailment may be constituted either by express or implied contract, and it is equally a universal rule that a bailment may arise from quasi- or constructive contracts." This class of bailments are not true bailments, but their assimilation into the bailment class has been accepted by lawyers and justified by experience. They are constructive bailments.

"Confusion has been engendered by certain cases which seem to discuss constructive bailment as if it were identical with constructive delivery. Formerly delivery was regarded as the essence of bailment. As this branch of the law has developed cases of constructive bailment have been recognized covering cases where there had been no delivery, either actual or constructive, as where one held possession of a chattel under such circumstances that the law placed upon the person having the possession of the chattel the obligation to deliver it to another.—In actual bailment there must be a delivery of the chattels to the bailee or his agent. The delivery may be actual or constructive.—A constructive bailment arises where the person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation of delivering it to the owner."[17]

It is admitted by all that in true bailments delivery is essential. The word bailment itself signifies delivery.[18] Delivery may be actual, constructive, or by operation of law. Although actual delivery is easily understood and is frequently concomitant with other consideration, it may be bothersome as a question of fact. Thus the question arises whether there has been a delivery of an automobile placed in a parking space for which a fee was charged.[19] Constructive delivery is not so easily understood until associated with the facts and usually arises where actual delivery is inconvenient or impossible. Thus the vendor of goods retaining possession which he never lost, is bailee for the vendee;[20] one farming on shares is bailee of his landlord's share when determined;[21] a merchant is bailee of garments left on a store counter

16. (1909) 56 Tex. Cr. R. 307; 120 S. W. 183.
17. Wentworth v. Riggs (1913), 159 App. Div. 899; 143 N. Y. S. 955.
18. 2 Black. Comm., 451, 2
19. Galowitz v. Wagner, 203 N. Y. S. 421; contra, Ex Parte Mobile, L. & R. Co., 211 Ala. 525.
20. Weinstein v. Sheer (1923), 98 N. J. L. 511; 120 Atl. 679.
21. Smith v. State (1910), 7 Ga. App. 468; 67 S. E. 202.

by a shopper while trying on other garments;[22] delivery of a key to a warehouse is constructive delivery,[23] but the control must be complete.[24] But there is no constructive delivery of papers or valuables in a receptacle such as a will in a box;[25] nor of papers in a box given to a hotel keeper;[26] nor of papers in a sealed envelope.[27] The delivery in the cases of finding of lost goods is not, like the above, actual or constructive delivery but is a constructive bailment made such by operation of law, the consent of the owner being absent.[28] Such, too, is the seizure of goods under legal process.[29]

The reciprocal of delivery, acceptance, is essential and the vendee cannot compel the vendor to become a bailee by leaving the goods on the vendor's premises;[30] the weighing and tagging of cotton left on a public platform without directions is not an acceptance;[31] there is no acceptance of money left in a pocket at a bathing house;[32] nor of an automobile left in an enclosure,[33] nor of undisclosed valuables left in a trunk.[34]

The finder's quasi-contractual obligation does not arise except through his voluntary acceptance, by taking possession of the goods. "No person can be compelled to become a depositary without his own consent; but there are cases where a person may be subject to the duties and liabilities of a depositary without any intention on his part to enter into any contract, or to assume any liability in regard to the property in question. The finder of property of a person unknown is not bound to interfere with it. He may pass by, if he please, and has then no responsibility in relation to it; but if he takes it into his possession, he becomes at once bound, without any actual contract and per-

22. Bunnell v. Stern (1890), 122 N. Y. 539; 25 N. E. 910; 19 Am. St. Rep. 519.
23. King v. Jarman (1879), 35 Ark. 190, 37 Am. Rep. 11, 16.
24. Security Warehousing Co. v. Hand (1906), 206 U. S. 415.
25. Sawyer v. Old Lowell Nat. Bank (1918), 230 Mass. 342; 119 N. E. 825.
26. Horton v. Terminal Hotel & Arcade Co. (1905), 114 Mo. App. 357, 99 S. W. 363.
27. Scollans v. E. H. Rollans & Sons (1901), 179 Mass. 346, 60 N. E. 983; 88 Am. St. Rep. 386.
28. Hoagland v. Forest Park Highlands Amusement Co. (1902), 170 Mo. 335; 70 S. W. 878; 94 Am. St. Rep. 740.
29. Blake v. Kimball (1870), 106 Mass. 115.
30. Weinstein v. Modern Silk Co., 170 N. Y. S. 529.
31. Bertig v. Norman (1911), 101 Ark. 75; 141 S. W. 201; Ann. Cas. 1913D, 943.
32. Walker v. Buffalo (1919), 106 Misc. 640; 175 N. Y. S. 274.
33. Suits v. Electric Park Amusement Co. (1923), 213 Mo. App. 275; 249 S. W. 656.
34. Michigan C. R. Co. v. Carrow (1874), 73 Ill. 348; 24 Am. Rep. 248.

haps without any actual intention to bind himself, to the owner of the property for its safekeeping and return."[35]

"The term, contract implied in law, is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."[36]

When goods are found, mislaid, or deposited by natural forces, the rights and obligations of the loser and finder are similar to those of bailors and bailees, because there is a bare possessory right in the chattels of another under an obligation assumed by the one taking possession to return them or account for their conversion. Story called them quasi-deposits and felt that they should be included in bailments, but does not indicate that their inclusion changed the nature of the bailment class as a whole.[37] They might well be grouped together under some such title as would cover the obligations, rights, and duties of owners and finders of lost goods.[38]—But since three groups, torts, contracts, and undertakings, have not been recognized, we can justifiably retain them only in contracts as they do not belong in torts.

A modern writer says, "while in the overwhelming majority of instances the bailment relation is founded on the mutual agreement of both the bailor and bailee, in exceptional cases bailments may exist without such an agreement. One may become a constructive bailee in the absence of any contract between the parties.—Many writers, in such instances, say that the consent of the parties is implied and that there is thus a contract.—To say that the law, under certain circumstances, imposes an affirmative duty upon a person does not necessarily mean that he agrees to perform that duty. An obligation is hardly contractual when imposed without the consent of the parties. It therefore seems a perversion of language to say, in cases such as that indicated, that a bailment is always the result of a contract."[39] The same writer defines bailment as "the relation created through the transfer of the possession of goods or chattels, by a person called the bailor to a person called the bailee, without a transfer of ownership, for the accomplish-

35. Costello v. Ten Eyck (1891), 86 Mich. 348; 49 N. W. 152; 24 Am. St. Rep. 128.
36. Keener, A Treatise on the Law of Quasi-Contracts, p. 5.
37. Story, Comm. of the Law of Bailments, Sections 85, 86, 87.
38. See Beale, note 6, supra.
39. A. M. Dobie, Handbook on the Law of Bailments and Carriers, pp. 23, 24.

ment of a certain purpose, whereupon the goods or chattels are to be dealt with according to the instructions of the bailor."[40] This definition stresses the relation as a result of delivery although, as indicated above, the writer admits that "in the overwhelming majority of instances" the relation is founded on mutual agreement."

To define bailments as a class so as to make a definition which will convey the full modern conception, requires that consideration be given to all the elements involved. To adjust the definition to a minor group of transactions, the finding of lost goods and the deposit by natural forces on another's property, is to classify a large group by the characteristics of a few of its members, the latter having been assimilated for convenience of remedy. That remedy is properly a division of contract, that is, constructive or quasi-contracts.[41] If it is said that "quasi ex contractu" is an expression derived from Roman law and that the principles of Roman law have no place in a proper juristic conception of the rights, duties, and liabilties incident to Anglo-American law, then the contribution to modern law and particularly to the subject of bailments rendered by Lord Holt, Sir William Jones, and Joseph Story, which have so strongly influenced modern ideas on that subject, must be rejected. In attempting to assemble the elements essential to a comprehensive definition, must we also eliminate the contributions of Lord Mansfield and other exponents of the contractual view, and the effects of other forces during several centuries, and return to the original sources of legal conception, the product of a civilization and an economic and political system long outgrown?

The doctrine of relationship as it existed during the feudal period does not exist today. Individuality has made its impress on Anglo-American law. The survivals of fundamental relationships in such situations as principal and agent and master and servant, are those which have stood the test of time and the development of civilization, but they do not arise until there has been an agreement by which the agent undertakes to represent the principal or the employee to labor for another and rarely, today, to become a member of the household group. The rights, duties, and obligations arising from the family status and the relationship of master and servant of the feudal period, the small manufacturer and his employees, are usually exempted from the operation of workmen's compensation acts. The standardization

40. Ibid., p. 1.
41. Moses v. MacFerlan, 2 Burr. 1005; 97 Eng. Rep. R. 676;
Hertzog v. Hertzog, 29 Pa. St. 465, 468;
Ames, History of Assumpsit, Vol. 3, Select Essays in Anglo-American Legal History, 259, 292.

of the duties of an individual or corporation, devoting his capital and services in a business affected with a public interest and the efforts of society to place upon a business, instead of its owner or through its management, the burden of supporting or rehabilitating those injured in its operation and their dependents, in lieu of that burden falling upon the public-at-large, is not comparable to the duties and obligations of the feudal period though there may be some analogy between them. If it is a recognition of status, it is that of a modern status and the similarity is confined to the survivals of those features which fit in modern life. Story,[42] Stevens,[43] Blackstone,[44] Jones,[45] and Kent,[46] included contract, express or implied, in their definition of a bailment. Schouler[47] omitted contract, accepting the following definition, "a delivery of some chattel of one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished." He does say, however,[48] "bailments for the bailor's sole benefit, are commonly founded in contract and an express undertaking," and adopts Story's classification of quasi-bailment for the finding of lost goods.[49] All agree on the other essentials, that is, delivery, involving acceptance, a bailment purpose, and a redelivery or a delivery over. Having in mind the elements which modern usage requires in attempting to group together under one definition those transactions commonly recognized as included in one class, it would appear that the finding of lost goods and involuntary deposits are accepted as bailments. Actions for breach of the duties and liabilities connected therewith, are brought upon the constructive promise to perform them, that is, upon constructive contract. It is generally agreed that other bailments are based upon contract, express or implied. The source, then, of the duties and obligations in bailments is contractual, express, implied, or constructive. The definition of another modern writer comes closer to the accepted conception of the profession in regard to bailments: "a bailment is a contract relation resulting from the delivery of personal chattels by the owner, called the bailor, to a second person, called the bailee, for a specific purpose, upon the accomplishment of which the chattels are to be dealt with according to the owner's direction."[50]

42. Comm. on Law of Bailment, Section 1.
43. Comm., Book 2, Part 2, c. 5, p. 80.
44. 2 Black Comm., 451.
45. Bailments, p. 117.
46 2 Kent Comm., 558.
47. A Treatise on Law of Bailments, p. 1.
48. Ibid., p. 32.
49. Ibid., p. 55.
50. E. C. Goddard, Outlines of the Law of Bailments and Carriers, p. 1