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THE EMERGING PATTERN OF FIELD WAREHOUSE LITIGATION: LIABILITY FOR UNEXPLAINED LOSSES AND NONEXISTENT GOODS

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I. INTRODUCTION

If, as Professor Gilmore suggests,[1] we are about to enter a new phase in litigation involving field warehousing and warehouse receipts, then one of the harbingers of this new focus is *Procter & Gamble Distributing Co. v. Lawrence American Field Warehousing Corp.*[2] This case, which grew out of the nefarious activities of Tony DeAngelis and Allied Crude Vegetable Oil Refining Co. ("Allied"), involved the liability of a field warehouseman[3] to the

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1 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 6.1, 6.8.2, at 147, 195 (1965) [hereinafter cited as Gilmore].

2 16 N.Y.2d 344, 213 N.E.2d 873, *rev'g* National Dairy Products Corp. v. Lawrence American Field Warehousing Corp., 22 App. Div. 2d 420, 255 N.Y.S.2d 788 (1965) [hereinafter cited as P & G].

3 The original issuer of the receipts in question was American Express Field Warehousing Corp., a wholly-owned subsidiary of American Express Company. In May, 1963, American Express sold the business to Lawrence Warehouse Company, at which time the name Lawrence American Field Warehousing Corp. was assumed. The warehousing business which the transferred corporation had with Allied had been excepted from the sale, and had been transferred instead to American Express Warehousing, Ltd., a newly created subsidiary of American Express. At the time of this suit, both Lawrence American and American Express Warehousing were bankrupt. The latter, however, was not a party to the suit, although Lawrence American had joined American Express as a third-party defendant. 22 App. Div. 2d at 424, 255 N.Y.S.2d at 793-4. In considering the liability of Lawrence American, the Appellate Division stated: "It is also concluded that the first bailee, Lawrence American Field Warehousing Corp., is not discharged of its primary responsibility under the warehouse receipts by reason of the transferred custody of the oil to the second bailee, American Express Warehousing, Ltd. On any view, even if the transferred custody to the second bailee, Limited, was authorized or subsequently ratified by the receipt holders or their successors in interest there is no evidence of an actual novation by which the first bailee, Field, would be discharged of its primary responsibilties. At best there was only the addition of another obligor, the second bailee, to which the first bailee delegated its responsibilities." *Id.* at 423, 255 N.Y.S.2d at 793.

Plaintiffs contended that the transfer of the oil from American

holders of its warehouse receipts representing salad oil supposedly on deposit in numerous storage tanks leased by Allied to the warehouseman for use as a field warehouse. Because the defendant was initially unable to prove either that the oil had ever been in the tanks at all, or that it had been there at one time and then removed, a substantial measure of liability was imposed upon the unfortunate warehouseman who, upon examination, had discovered that the storage tanks contained a conglomerate liquid composed mostly of "acid soap stock, fish oil and water."[4]

Prior to the promulgation and general enactment of the Uniform Commercial Code, field warehousing was used as a financing and perfection device.[5] It was, and still is, a tripartite relationship involving a lender, a borrower and an independent warehouse company. To facilitate secured lending, and to permit the lender to obtain a valid lien on a shifting stock of inventory, the following arrangement was devised: borrower, usually but not always a manufacturer or wholesaler, would lease a portion of his plant or warehouse space, at a nominal rental, to the warehouseman for use as a field warehouse. The "field warehouse" was fenced off or otherwise set apart from the remainder of the borrower's facilities, and signs were placed all around to indicate that the area was being used as a field warehouse and that the merchandise contained therein was not the borrower's. Thus, the lender obtained "possession" of the borrower's inventory, vital both for purposes of obtaining the valid lien which the lender devoutly desired, and for the distinct advantages which accrue in bankruptcy from possession.[6] The warehouse "manager," nominally an employee of

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Express Field Warehousing to Limited constituted a conversion because unauthorized. This contention was held to create a triable issue, and the refusal of the trial court to grant summary judgment on this issue was affirmed. *Id.* at 426-27, 255 N.Y.S.2d at 795-6; aff'd, 16 N.Y.2d 344, 361-62, 213 N.E.2d 873, 883 (1965).

[4] 16 N.Y.2d at 363, 213 N.E.2d at 883.

[5] For complete and detailed descriptions of the field warehousing operation, *see* Skilton, *Field Warehousing as a Financing Device*, 1961 WIS. L. REV. 221; Skilton, *Field Warehousing as a Security Device*, 1961 WIS. L. REV. 403; Comment, *Financing Inventory Through Field Warehousing*, 69 YALE L.J. 663 (1960). Other treatments of field warehousing as a device to encourage secured financing may be found in Birnbaum, *Form and Substance in Field Warehousing*, 13 LAW & CONTEMP. PROB. 579 (1948); Friedman, *Field Warehousing*, 42 COLUM. L. REV. 991 (1942); Kane, *The Theory of Field Warehousing*, 12 WASH. L. REV. 20 (1937).

[6] If nothing else, possession of the property will force the trustee in bankruptcy to institute plenary proceedings in order to recover the same, and will have the concomitant effect of saving the secured lender the necessity of filing a reclamation petition, thereby possibly

the warehouse company, was really an employee of the borrower "on leave," usually that employee most familiar with the procedures of the borrower relating to the storing and maintaining of his inventory, that is, the stock clerk. As goods were deposited in the field warehouse by the borrower, warehouse receipts were issued against them. These receipts were pledged as collateral for the loans made by the lender, and the goods represented thereby were released by the lender to the borrower if and when either the loan, or an aliquot portion thereof, was repaid, or when the goods to be released were replaced by new goods of equivalent or greater value.

As a financing device, field warehousing was generally successful in attaining the desired goals. Any attack on the field warehouse usually was based upon the manner in which the warehouse was run. If the formal mechanics of warehouse operation were not followed, then the lender did not in fact have "possession" of the goods and, typically, when his possession fell so did his lien. However, the era of attacks leveled upon field warehouses because of the manner in which they are operated is over.[7] Very few recent cases have dealt with this issue,[8] and it may be safely assumed that such cases will in the future continue to be rare. This is due both to increased sophistication on the part of the warehousemen and lenders, who seem to have profited by past judicial scrutiny of their field warehouse operations, and to the fact that the Uniform Commercial Code has, in most cases, made field warehousing primarily a policing device to be engaged in by secured lenders when they want more control over the inventory of their borrower than a security interest perfected by filing in accordance with the relevant Code provisions[9] will give them. Not content to rely upon the perfection by possession provision of the Code,[10] most, if not all, lenders will prefer to perfect their security interests by filing the appropriate financing statements. This procedure will, of course, diminish the importance of field warehousing as a perfection device, but at the same time will not lessen its importance as extra pro-

subjecting itself to the summary jurisdiction of the bankruptcy court. *See* 2 J. MOORE, COLLIER ON BANKRUPTCY ¶ 23.06[2] (14th ed. 1966); Bankruptcy Act § 23, 11 U.S.C. § 46 (1952); Seligson & King, *Summary v. Plenary Jurisdiction*, 36 REF. J. 73 (1962); Katchen v. Landy, 382 U.S. 323 (1966), *discussed in* Palmer, *The Supreme Court Speaks on Bankruptcy*, 40 REF. J. 44 (1966).

7 *See* Gilmore, *supra* note 1, § 6.5, at 170.

8 Among the few cases considering the validity of the field warehouse operation are Ribaudo v. Citizens Nat'l Bank, 261 F.2d 929 (5th Cir. 1958), and Bostian v. Park Nat'l Bank, 226 F.2d 753 (8th Cir. 1955).

9 UNIFORM COMMERCIAL CODE §§ 9-302, 9-401, 9-402, 9-403. All UNIFORM COMMERCIAL CODE citations herein are to the 1962 Official Text.

10 UNIFORM COMMERCIAL CODE § 9-305; *See* Gilmore, *supra* note 1, § 14.3.

tection for the secured lender. Having "possession" of the collateral still has the obvious advantages in the event of the borrower's bankruptcy.[11] Furthermore, field warehousing gives the lender the greater knowledge of, and control over, the day-to-day operations of the borrower. Thus, while the perfection advantages of field warehousing and, consequently, litigation growing out of attempts to perfect, will be of minimal importance as the Code becomes law in most states, there should be increasing litigation concerning other aspects of the field warehouse operation. The instant article will deal primarily with the case of the fraudulent borrower who has somehow either gotten the goods out of the field warehouse without the permission of the holder of the warehouse receipt, or has in some devious manner managed to have the warehouseman issue receipts for goods which were never in fact in the warehouse at all. If Mr. DeAngelis, "a person of questionable business standing,"[12] could be so adept in bilking the warehousemen and lenders with whom he was involved, there is little doubt but that other businessmen, with perhaps better reputations initially, will be able to do the same, albeit perhaps not on such a grandiose scale.

In the *P & G* case, six plaintiffs, holders of warehouse receipts issued by the defendant warehousemen, filed suit in the state courts of New York seeking damages for the failure of the defendant warehouseman to deliver upon demand the salad oil evidenced by the warehouse receipts of which they were the owners. Four of the plaintiffs were holding receipts as collateral for loans made to Allied while the other two, including Procter & Gamble, were suppliers of Allied who had embarked upon a field warehousing program in order to secure the payment of the full purchase price of the salad oil by Allied.[13] Originally P & G had been selling outright to Allied on sight draft with bill of lading attached. However, in the fall of 1962, Allied, using as justification the fact that it wished to more fully utilize its working capital, prevailed upon P & G to engage in field warehousing selling. Thereafter, the oil was shipped f.o.b. P & G's plant or warehouse, Bayonne, New Jersey. The oil would be shipped to Bayonne, where the warehouse was located, to P & G's order, and stored for its account in defendant's warehouse tanks. Down payments of twenty per cent of the purchase price were made by Allied at the time of the purported

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[11] *See* note 6 *supra.*

[12] 22 App. Div. 2d at 430, 255 N.Y.S.2d at 798-99.

[13] For a description of the manner in which field warehousing is used as a device by which sellers may extend credit to their purchasers, *see* Notes and Comments, *Financing Inventory Through Field Warehousing*, 69 YALE L.J. 663, 693-97 (1960); Major Appliance Co. v. Gibson Refrig. Sales Corp., 254 F.2d 497 (5th Cir. 1958).

receipt of the oil in the warehouse, and the balance by sight draft with bill of lading attached, or cash in advance of shipment to buyer, as Allied disposed of the oil. In all cases, involving lenders and sellers, the defendant issued nonnegotiable warehouse receipts for the oil as it was supposedly received into its warehouse. When demand was ultimately made by the plaintiffs for delivery of the oil and the warehousemen refused, contending that there was no oil to deliver, these instant suits followed. The New York Supreme Court, Special Term, granted summary judgments for the receipt holders. Cross-appeals were taken to the Appellate Division, where the granting of the summary judgments was upheld, but the case reversed on the question of damages and remanded for a determination of the quantum thereof. Appeal was then taken by P & G to the Court of Appeals,[14] which reversed the order of the Appellate Division regarding damages and reinstated the order of the trial court. The summary judgments on the issue of liability were again affirmed. The questions of liability and damages will be considered seriatim.

II. LIABILITY

The *P & G* case was brought by the receipt holders on a theory of conversion; *i.e.*, that the warehouseman had converted the goods evidenced by the receipts when, after a lawful demand, it had refused to deliver the goods to the holders of the receipts, persons entitled to make such a demand. As will hereinafter be shown,[15] while the plaintiffs' theory of the case is somewhat anachronistic and perhaps unsupportable in any event, the question of liability was decided the same way and much the same rationale used as would have been the case had the action been brought either on a theory of breach of contract (the warehouse receipts containing a covenant to redeliver upon demand) or tort (for negligence on the part of the warehouseman while the goods were in its custody resulting in their loss). The central fact, both for the Appellate Division and the Court of Appeals, was that the warehouseman had admitted that it had no idea whether the salad oil had ever gotten into the storage tanks, or whether once there, it had been removed by one or more employees or confederates of Allied and DeAngelis. In admitting this, the Appellate Division held, the warehouseman had proved its own liability. The court argued that once the holder of the receipt has shown demand and non-delivery,

[14] The remaining five plaintiffs had accepted settlement offers made by American Express Co., rendering their appeals moot. Letter from William W. Owens, attorney for Procter & Gamble, to the author, June 23, 1967, on file in Nebraska Law Library.

[15] *See* text accompanying notes 43-48, *infra*.

the warehouseman has the threshold burden of presenting a legal excuse for his nondelivery. Failing to do even this, he has been hoist by his own petard. In most cases, a showing of some reason for the loss of the goods, such as fire, flood or burglary, would force the court to consider the question of allocation of the burden of proof with respect to showing the exercise of due care on the part of the warehouseman. In this case, however, the court was not called upon to reach this question, which must be considered only where the warehouseman has at least been able to show with certainty the cause of the nondelivery. If, for example, the warehousemen had shown that the goods were in the field warehouse at one time, but were later stolen, the issues would be defined, and either the plaintiff would have had the burden of proving negligence, or the defendant the burden of proving that it had exercised due care. Of this allocation of burden of proof more later.[16] For present purposes, however, the warehouseman had not been able to get over the first hurdle, proving the facts which resulted in the loss of the goods. "The primary fact is," the Appellate Division stated, "that the bailees did not deliver the oil on demand, and they have no explanation for its nonexistence or disappearance."[17] This was enough for the court to impose liability upon the warehouseman. How can there be due care, the court asks, when the warehouseman cannot even show what happened to the goods in regard to which it had the obligation of exercising such care?

The Court of Appeals, however, took a somewhat different tack in pinning liability upon the warehouseman. Because it had issued warehouse receipts, and because it had issued a series of month-end statements indicating that the oil was in the warehouses, "in the absence of any evidentiary facts showing that defendant did not receive the oil in suit, its warehouse receipts, month-end statements and books of account are conclusive against defendant on this point. Mere suspicion that the oil was stolen before reaching defendant's tanks is not sufficient to overcome this documentary evidence."[18] Thus, whether lack of knowledge is considered as conclusive evi-

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[16] *See* text accompanying notes 20-39, *infra.*

[17] 22 App. Div. 2d at 429, 255 N.Y.S.2d at 798.

[18] 16 N.Y.2d at 351, 213 N.E.2d at 876. The Appellate Division had taken an entirely different approach with respect to the documentary evidence: "In the light of the general mystery it is not particularly significant that Field subsequently issued inventories showing possession of the oil. Such inventories are no more reliable than the receipts themselves; they simply provide book records and statements with respect to quantities of oil for which receipts were outstanding, but so did the receipts to begin with. These were not physical inventories but, in effect, transcripts, from unverified book entries, at least so far as one can tell." 22 App. Div. 2d at 428, 255 N.Y.S2d at 797.

dence of negligence, or whether the receipts and other "documentary evidence" are considered as creating something analogous to a rebuttable presumption which the warehouseman did not rebut, the same result is reached.[19] In either case, the failure to show what happened supported the granting of the summary judgments in the trial court. Under the theory of the Appellate Division, showing what had happened to the oil would have forced the court to reach the factual question of the defendant's negligence, presumably a jury question, while under the rationale adopted by the Court of Appeals such a showing would have "rebutted" the presumption raised by the "documentary evidence," thus permitting the warehouseman to present evidence of a lawful excuse for the failure to deliver upon demand; such a lawful excuse would be lack of fault upon its part, either with respect to goods never received for which it has issued receipts, or for goods for which receipts had properly been issued, but which somehow disappeared between the time of deposit and the time of demand. In either case, then, the question at issue would have boiled down to the negligence, or the lack thereof, on the part of the warehouseman.

To fully understand the effect of the failure of the warehouseman in *P & G* to present evidence of a lawful excuse, some consideration must be given to the varying rules regarding burdens of proof in cases involving warehouse receipts. Some courts have recognized that conversion is not the cause of action at all where demand has been made and delivery refused, but that the action will be either in contract or in tort for negligence.[20] However, most courts still speak in terms of conversion, as did the New York courts in *P & G*. Both under the common law and under the Uniform Warehouse Receipts Act[21] there was great confusion and contradiction regarding just what burdens the receipts holder (or bailor) and warehouseman (or bailee) were required to carry before a verdict and judgment in the favor of either would be justified. Thus, instances abound of courts holding that the burden of proof of negligence of the warehouseman is on the bailor-plaintiff,[22] that the burden of proving freedom from fault is on the bailee-

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[19] This is made clear in the opinion of the Court of Appeals, in which it is stated that if the defendant had given "affidavits in opposition presenting evidentiary facts contradicting defendant's warehouse receipts and business entries" there might have been a triable issue of fact. 16 N.Y.2d at 357, 213 N.E.2d at 880.

[20] *See* text accompanying notes 43-48, *infra*.

[21] UNIFORM WAREHOUSE RECEIPTS ACT § 1 (act withdrawn 1962) [hereinafter cited as the UWRA].

[22] *E.g.*, Erlbacher v. Republic Homes Corp., 263 F.2d 217 (8th Cir. 1959); Dick v. Reese, 90 Idaho 447, 412 P.2d 815 (1966); Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 P. 55 (1922).

defendant,[23] or that only the burden of going forward with the evidence is on the latter.[24] This confusion is not only pandemic but endemic. Time and time again one sees courts in the same state reaching antinomical results in apparently identical cases, justifying the difference perhaps on the basis of the manner in which the complaint is framed (whether it sounds in tort or in contract), asserting that the UWRA has or has not changed the rules of the common law cases dealing with burden of proof, or perhaps ignoring the conflicting decisions altogether.[25]

The confusion may in the first instance be said to have been engendered by the similarity of matters of proof in all warehouse receipt cases where the "gist" of such actions, whether brought in tort or in contract, is negligence. The first great dispute arose after the promulgation of the UWRA,[26] and was concerned with

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[23] *E.g.*, Hogan v. Allison, 263 Ala. 451, 82 So. 2d 909 (1955); Gaudin Motor Co. v. Wodarek, 76 Nev. 415, 356 P.2d 638 (1960); McKenzie v. Hanson, 143 N.W.2d 697 (N.D. 1966). "Liability of a bailee under a bailment for mutual benefit arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage of the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. The burden of proof in such cases, in the first instance, rests upon the bailor to make out a prima facie case. This has been done when the bailor proves [the foregoing three items]. When the bailor has so proven, the burden is then shifted to the bailee to show that he has used ordinary care in the storage and safekeeping of the property." Shoreland Freezers, Inc. v. Textile Ice & Fuel Co., 241 S.C. 537, 538, 129 S.E.2d 424, 425 (1963).

[24] *E.g.*, Horner Transfer Co. v. Abrams, 150 Ark. 8, 233 S.W. 825 (1921); Walter v. Sanders Motors Co., 229 Iowa 398, 294 N.W. 621 (1940); Noel & Co. v. Schuur, 140 Tenn. 245, 204 S.W. 632 (1918).

As Professor Wigmore has stated: "Where the goods have been committed to a *bailee*, and have either been lost or been returned in a damaged condition, and the bailee's liability depends upon his own negligence, the fact of negligence may be presumed, placing on the bailee at least the duty of producing evidence of some other cause of loss or injury." 9 J. WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2508 (3rd ed. 1940).

[25] *Compare* England v. Lyon Fireproof Storage Co., 94 Cal App. 562, 271 P. 532 (1928) *with* Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 258 P. 596 (1927); *Compare* Dick v. Reese, 90 Idaho 447, 412 P.2d 815 (1966) *with* Shockley v. Tennyson Transfer & Storage Inc., 76 Idaho 131, 278 P.2d 795 (1955); *Compare* Neo-Smelting & Ref., Inc. v. Harris Warehouses, Inc., 13 Misc. 2d 290, 175 N.Y.S.2d 405 (City Ct. 1958) *with* Jacobs v. Alrae Hotel Corp., 4 App. Div. 2d 201, 164 N.Y.S.2d 330 (1st Dep't 1957); *and Compare* David v. Lose, 7 Ohio St. 2d 97, 218 N.E.2d 442 (1966) *with* Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 58 N.E.2d 658 (1944).

[26] The UWRA was approved by the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS in 1906. 3 UNIFORM LAWS ANNOTATED

whether or not that Act had changed the common law with respect to the burden of proof in warehouse receipt cases. It seems clear that at common law, in the case of a bailment unaccompanied by the issuance of warehouse receipts, followed by destruction of the bailed goods, where the action usually sounded in tort,[27] the burden of proving negligence was upon the party who alleged it as essential to his cause of action—the bailor.[28] With the development of central and field warehousing accompanied by the issuance of warehouse receipts, the bailor, in addition to his tort action, now had a contract—the warehouse receipt—in which the bailee-warehouseman promised to redeliver the bailed goods upon demand made by the holder of the warehouse receipt. To clarify the terms of this contract, the UWRA, in section 8, provided that:

> In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.[29]

The courts were confused as to just what "burden" section 8 was talking about. Did the term "lawful excuse" encompass the burden of proof with respect to negligence or only the burden of going forward? And in any case, did this section apply only to contract actions or was it also apposite where the receipt holder or depositor brought an action in tort alleging that the warehouseman's negligence had resulted in the loss of the goods rendering the warehouseman unable to redeliver them upon demand? There was also a question, similar to but not identical with the foregoing questions, as to just what effect the UWRA had had upon the common law of the state in question as to the various evidentiary allocations which had previously been made in bailment cases.

Also relevant to these cases was section 21 of the UWRA, which provided:

> A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he

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VII (1959). Prior to its being superceded by the UNIFORM COMMERCIAL CODE, it had been adopted, with some variations, in all 50 states. *Id.* at 9 (Supp. 1966).

[27] *But cf.* David v. Lose, 7 Ohio St. 2d 97, 218 N.E.2d 442 (1966), where the court states that there exists a common-law contract action for failure of the bailee to redeliver.

[28] *E.g.*, Knights v. Piella, 111 Mich. 9, 69 N.W. 92 (1896) Claflin v. Meyer, 75 N.Y. 260 (1878); Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 P. 55 (1922).

[29] UWRA § 8.

> shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.[30]

Thus, the standard of care has been set, we know to whom this standard is owed, and it would seem that section 8 has told us who has the burden of showing that that standard has been met. However apparent this may seem to the academic, it has not been quite as clear to the courts interpreting the statute. We thus have a profusion of rules and rationales leading to incredibly diverse results on identical facts.

The early development of the law under the UWRA, where actions were still usually brought on a tort theory, resulted in a procedural allocation of burdens which generally went as follows: The bailor, if he brings his action in tort, alleging negligence, makes a prima facie case, sufficient to go to the jury in the absence of rebuttal evidence by the defendant, when he proves the bailment, the demand for redelivery, and the refusal of the warehouseman to redeliver. All that the warehouseman has to do to meet this prima facie case is to show that the goods were destroyed, for example, by fire. Thus, he has carried what was called "the burden of going forward." Once he has done this, the burden of going forward shifts back to the bailor (upon whom, it was said, the "burden of proof" had always remained) to show that the fire was the result of the negligence of the warehouseman in operating his warehouse.[31] The courts adopting this rule looked no further than the complaint in reaching their result: if the plaintiff pleaded negligence, it was incumbent upon him to prove it. The UWRA, it was said, having done nothing more than regulated contractual relations, had not changed the common law regarding the burden of proof in negligence cases.

As plaintiffs became alerted to and more wary of this rule, recognizing the difficulties which they faced in proving the negligence of the warehouseman, they began filing complaints alleging breach of contract. They pleaded the warehouse receipt, the delivery, the demand, and the refusal of the warehouseman to redeliver. Negligence was not alleged. This, it was contended, was sufficient to establish a breach of the contract embodied in the warehouse receipt. The warehouseman was then forced, in his answer, to allege due care. As a result, many courts began distinguishing

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[30] UWRA § 21.

[31] *E.g.*, Alpine Forwarding Co. v. Pennsylvania R.R., 60 F.2d 734 (2d Cir. 1932); Jacobs v. Alrae Hotel Corp., 4 App. Div. 2d 201, 164 N.Y.S.2d 330 (1st Dep't 1957). Brace v. Salem Cold Storage, Inc., 146 W.Va. 180, 118 S.E.2d 799 (1961).

between tort and contract cases.[32] While they admitted, now somewhat grudgingly, that the UWRA had left the tort rule intact, it was said that the contract rule in cases involving negligence had been changed; that all the plaintiff had to do was allege bailment, demand and refusal to deliver, and upon proving this, he had made a case for directed verdict or summary judgment unless the warehouseman came forward and not only proved the nature of the cause that had resulted in destruction of the goods, but also proved that that cause had resulted independently of his negligence. That is, the defendant had alleged due care and, having alleged it, had the burden of proving it. Sections 8 and 21 were clear, it was said, and "burden" in section 8 meant just that, that the warehouseman had the burden of proving not only the "lawful excuse," but a lawful excuse which included freedom from fault. Fault was, of course, measured by the standards of section 21.

From this second rule, it was an easy step for the more forward-looking courts to reach the conclusion that the form of pleading was irrelevant, and that the result should not and could not be governed by the perspicacity, or the lack thereof, of the plaintiff's lawyer. Because negligence was the "gist" of both the tort and the contract action, the burden of proof should not vary with the manner in which the complaint was couched.[33] The party who had the burden in the one case should also have it in the other. This conclusion having been reached, it now became simply a matter of policy as to whom should have the burden of proof with respect to the issue of negligence. It was easy for these courts to conclude that the warehouseman was better able to carry this burden, due to the greater accessibility which he had to the production of the facts explaining the causes of the injury which had befallen to the goods. Sometimes this result was justified on a policy argument analogous to res ipsa loquitur;[34] other times, it was justified solely on grounds of public policy, without a further articulation of just what those policy grounds were. In any event, more and more of the courts came to the conclusion that it was for the warehouseman

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[32] Price & Pierce Ltd. v. Jarka Great Lakes Corp., 37 F. Supp. 939 (W.D.Mich. 1941); Alabam's Freight Co. v. Jiminez, 40 Ariz. 18, 9 P.2d 194 (1932); David v. Lose, 7 Ohio St. 2d 97, 218 N.E.2d 442 (1966); Traders' Compress Co. v. Precure, 107 Okla. 191, 231 P. 516 (1924).

[33] George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 205 P.2d 1037 (1949); Denning Warehouse Co. v. Widener, 172 F.2d 910 (10th Cir. 1949); Brown v. Sloan's Moving & Storage Co., 274 S.W.2d 310 (Mo. 1954); Hanlon v. J. E. Miller Transfer & Storage Co., 149 Ohio St. 387, 79 N.E.2d 220 (1948).

[34] "This Court, in the case of private bailments, has given like effect to the rule that the unexplained failure of the bailee to return the bailed goods is prima facie evidence of his breach of duty.... This is

to show by a preponderance of the evidence that he had been free from negligence. This result, it must be admitted, goes much further than the procedural effect given to res ipsa loquitur, which in most courts has been treated as "nothing more than one form of circumstantial evidence."[35] In the warehousing cases, on the other hand, the loss of the goods may be said to create a presumption of negligence, which can be overcome only by affirmative proof presented by the warehouseman that he has indeed been free from negligence and that the warehouse was conducted and the merchandise safeguarded in such a manner as a "reasonably careful owner" of the goods would have cared for them.[36]

Perhaps the leading case espousing this latter view is *George v. Bekins Van & Storage Co.*,[37] in which Justice Traynor refused to be swayed by the manner in which the plaintiff's complaint had been phrased. He first noted that the UWRA "did not intend to make the burden of proof in cases involving storage contracts... turn on whether plaintiff chose to allege only the contract and its breach instead of alleging that while stored under contract the goods were destroyed as a result of defendant's negligent custody."[38] Thus it was clear, at least to this court, "that in cases governed by

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but a particular application of the doctrine of *res ipsa loquitur*, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of the evidence." Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 112-13 (1941). *See also* Romney v. Covey Garage, 100 Utah 167, 111 P.2d 545 (1941).

35 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 40, at 232 (3d ed. 1964). Professor Prosser also states that "A small minority of the courts... have held that it creates a presumption, which always requires a directed verdict for the plaintiff unless the defendant offers sufficient evidence to meet it." Id. at 234. Two states are mentioned as having gone even further by holding that res ipsa loquitur shifts to the defendant the ultimate burden of proof. The reasons given in support of such a position are the balance of possibilities in favor of the plaintiff, the defendant's exclusive control of the causes, and his superior information or opportunity to obtain evidence. "But," the author states, "this is to give to circumstantial evidence... a greater effect than direct evidence could have.... Such a policy seems called for only in cases, such as those of carrier and passenger, where some special responsibility assumed by the defendant toward the plaintiff justifies placing upon him the burden of proof, requiring him to exonerate himself by a preponderance of the evidence or make good the loss." Id. at 234-235. To the carrier and passenger case might be added the case of the warehouseman.

36 *See* cases cited note 33 *supra*.

37 33 Cal. 2d 834, 205 P.2d 1037 (1949).

38 *Id.* at 840, 205 P.2d at 1042.

the provisions of the [UWRA] the burden of proving that the goods were not lost because of negligence is on the defendant, whether plaintiff frames his complaint on a negligence or a breach of contract theory."[39] It followed, therefore, that where a fire of undetermined origin had resulted in a destruction of the bailed goods, the warehouseman was damned by the fact that he was unable to disclose the cause of the fire. Being unable to do so, he was guilty of negligence as a matter of course.

That the form of the pleadings should not govern the result was not as clear to the Oklahoma Supreme Court in *Trader's Compress Co. v. Precure.*[40] In that case, the court thought that the UWRA was not intended to change the state's common law rule in tort cases—that when the plaintiff bailor showed a deposit, demand, and failure to redeliver the goods, he had made a prima facie case; the burden was then upon the bailee to establish his defense; that this was accomplished when it was shown that the property was destroyed by fire; and that the burden of going forward then shifted back to the bailor to show that his loss was occasioned by the bailee's negligence. Thus, the court was "not in accord with the views of those courts holding that where recovery is sought, based on the negligence of the warehouseman, the statute had changed the rule as to burden of proof...."[41] The reason, perfectly clear to the court, was that the UWRA did not deal with burdens of proof in tort cases, but only with contract cases, and that in the case of a complaint based upon contract, the warehouseman would have the affirmative in proving a "lawful excuse" by showing that the goods were lost and that the loss was due to causes consistent with due care on his part. Fortunately for modern notions of pleading, this rationale finds very little support in the modern cases.[42]

Finally, there are those cases, of which *P & G* is one, that go off on the ground that the refusal to deliver the warehoused merchandise upon demand is a conversion for which the warehouseman is liable unless he can show that the failure to deliver occurred even though he had exercised due care with respect to the storage of the goods.[43] Putting aside those cases in which the goods had been wrongfully appropriated by the warehouseman for his own

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[39] *Id.* at 841, 205 P.2d at 1042.

[40] 107 Okla. 191, 231 P. 516 (1924). *See also* cases cited note 32 *supra.*

[41] *Id.* at 198, 231 P. at 523.

[42] *But see* David v. Lose, 7 Ohio St. 2d 97, 218 N.E.2d 442 (1966).

[43] Cleveland Storage Co. v. Guardian Trust Co., 222 Ala. 210, 131 So. 634 (1930); *see also* Mockford v. Iles, 217 Ind. 137, 26 N.E.2d 42 (1940), and cases cited in George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 838, 205 P.2d 1037, 1041 (1949).

use,[44] and those where the warehouseman wrongfully delivers the goods to one not entitled to them,[45] it is difficult to see what relevance the doctrine of conversion has to cases in which warehoused merchandise is destroyed by fire or some other casualty. It is perhaps the failure to distinguish between these essentially dissimilar types of cases that has led some courts to mix conversion and negligence, a difficult legal task at best. As Professors Harper and James have stated:

> If the defendant did not have the goods in his possession when the demand was made upon him, his failure to deliver is no conversion, even though it is by reason of his own fault that he does not have them.... [H]e may be liable for their value if they were stolen or lost because of his negligence in failing to protect them from loss, but he is not liable in trover for failing to deliver them on demand. "When there has been no actual conversion of property, a demand and refusal cannot lay a foundation for the action of trover, unless at the time of the refusal the party has the property demanded in his possession, so that he can comply with the demand."[46]

The court in *George v. Bekins* had also seen that conversion

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[44] E.g., Mockford v. Iles, 217 Ind. 137, 26 N.E.2d 42 (1940); Henson v. Markowitz, 341 S.W.2d 311 (Mo. App. 1960).

[45] *E.g.*, Metropolitan Vacuum Cleaner Co. v. Douglas-Guardian Warehouse Corp., 208 F. Supp. 195 (S.D.N.Y. 1962); Walker Bank & Trust Co. v. New York Terminal Warehouse Co., 10 Utah 2d 210, 350 P.2d 626 (1960). Furthermore, where it was shown that bailed property in a warehouse which was destroyed by fire had not been in the warehouse at the time of the fire, the warehouseman, being unable to show what had happened to the bailed property, was guilty of conversion. American Express Field Warehousing Corp. v. First Nat'l Bank, 233 Ark. 666, 346 S.W.2d 518 (1961).

[46] 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 2.27 (1956), citing Spear v. Alexander, 2 Phila. 89, 90 (Pa. 1856). Professor Prosser is in accord: "A conversion can result only from conduct intended to affect the chattel. For merely negligent intereference with it, such as failure to protect it against loss, damage, or theft, the remedy is an action for negligence; but there is no conversion, and trover would not lie.... The intent required [before there can be a conversion] is not necessarily a matter of conscious wrongdoing. It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 15 (3d ed. 1964). The author goes on to state that: "Not every failure to deliver upon demand, however, will constitute a conversion. The defendant does not become a converter when the goods are no longer in his possession or control, so that he is unable to comply with the demand, even though they may have been lost or destroyed through his own fault." *Id.*

The restatement is to the same effect: "One who does not intentionally exercise dominion or control over a chattel is not liable for a conversion even though his act or omission is negligent." RESTATEMENT (SECOND) OF TORTS, § 224 (1965). *See also Id.*, Comment *a* at 437.

had no place in cases concerning warehoused merchandise where the lawful excuse pleaded by the warehouseman for his failure to redeliver the merchandise upon demand was their destruction. Conversion, it was averred, "exists if there is an exertion of wrongful dominion over the personal property of another in denial of or inconsistent with his rights therein," as where the bailee, "having the power to do so," refuses to redeliver the goods to the bailor.[47] Where redelivery has become impossible because the goods have been destroyed there is no conversion. And negligence, even if proven, "is not an act of dominion over them such as is necessary to make the bailee liable as a converter."[48]

Thus it should have been necessary for the New York Court of Appeals in *P & G* to adopt a different rationale for its decision than the conversion theory accepted by the Appellate Division if it were not to be forced to dismiss the suit which, it must be remembered, was in conversion, for failure to state a cause of action. How could the court face the possibility, as the Appellate Division did,[49] that the goods had never been in the warehouse, for then it would be forced to decide that there could not have been a conversion? If it were assumed the salad oil had never been in the warehouse at all, what was there to convert? Thus the enforced reliance upon the documentary evidence which the warehouseman had to over-

[47] 33 Cal. 2d 834, 837, 205 P.2d 1037, 1040 (1949). *Accord*, French v. Bekins Moving & Storage Co., 118 Colo. 424, 195 P.2d 968 (1948).

[48] *Id.* at 838, 205 P.2d at 1040.

[49] One of the plaintiffs' contentions considered by the Appellate Division was that "the failure by defendant Field to account for the oil or to deliver the oil on demand was a conversion, without more...." 22 App. Div. 2d 420, 428, 255 N.Y.S. 2d 788, 796-97 (1965). The court rejected this argument, saying that there was not enough evidence from which it could conclude that there had been a conversion. The court then glossed over the paradox which resulted from this conclusion by shifting the focus of its opinion away from the conversion theory upon which the plaintiffs had brought the case, and concentrating on the obvious lack of due care on the part of the warehouseman who could not tell what happened to the purportedly warehoused merchandise. Thus, "there has not been any showing of sufficient care or explanation to exculpate them from liability. It is not enough to assert that care was taken, describing the practices used, when the disappearance of the oil remains wholly unexplained." *Id.* at 430, 255 N.Y.S.2d at 799. The court completely overlooked the fact that by so shifting the focus of the case, it was deciding for the plaintiffs on a theory wholly divorced from that of their action. The court did, however, attempt to justify their decision by stating that "[W]hether there was a conversion of actual oil or the false or improper issuance of receipts, summary judgment on the issue of liability should be granted." *Id.* at 432, 255 N.Y.S.2d at 800. As shown in the text following this note, the reconciliation of theory and result in this case is not quite that simple.

come but did not.[50] If the warehouseman in *P & G* had been able to show that the salad oil had never reached the storage tanks but had been misappropriated before it was delivered, the court should have dismissed the case. No cause of action against the warehouseman for conversion would then have existed. In such circumstances, the question of burden of proof would not have been reached. The irony of *P & G* is that by showing that it had issued warehouse receipts for goods not in its warehouse, the warehouseman would have escaped liability, surely showing greater fault or lack of care on its part than would be the case if the goods had been placed in the warehouse and then disappeared,[51] unless the plaintiffs were to be allowed to amend their complaints to allege either breach of contract or negligence. By showing a greater degree of fault, the warehouseman would have escaped liability, solely because of the manner in which the plaintiff's cause of action was framed.

The fundamental, pervading fault to be found in the opinions of the courts commenting upon this problem and which has led to a great deal of the difficulty surrounding the evidentiary allocations is that they have been preoccupied with the law of torts, overlooking completely the direct analogy between warehouse cases and cases involving impossibility of performance as a contract defense. In *Blount-Midyette & Co. v. Aeroglide Corp.*,[52] for example, defendant had contracted with plaintiff to install machinery in, and make alterations to, plaintiff's grain elevator. To effectuate the purposes of the contract, plaintiff turned complete control of the elevator over to defendant. While in defendant's exclusive possession and control, the elevator was destroyed by fire. Plaintiff filed suit to rescind the contract and have defendant return that portion of the contract price which had been paid to it prior to the time of the fire. The sole issue on appeal from a judgment for plaintiff, based upon a jury verdict, was whether the trial judge had correctly instructed the jury on the question of burden of proof. The instruction complained of had been to the effect that the defendant had the burden of showing that the fire had occurred *without its fault.*

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[50] The Court of Appeals did, however, revert to the language of conversion in discussing damages. *See* Part III *infra.*

[51] Or, as it was put by the Appellate Division: "Not only is a contradiction involved in a caretaker asserting due care and total lack of knowledge of what happened or how the mysterious disappearance could have happened, but as a policy matter the granting of legal effect to such an assertion would establish an iniquitous rule. The iniquity would result from the fact that a caretaker would be in a better position to be excused if he knew less than if he knew more." 22 App. Div. 2d 420, 432, 255 N.Y.S.2d 788, 800 (1965).

[52] 254 N.C. 484, 119 S.E.2d 225 (1961).

In affirming the judgment, and upholding the propriety of the instruction, the court held that where impossibility is pleaded as a defense to a lawsuit based upon a contract, the party pleading the defense must not only show the objective fact of impossibility, but must also demonstrate that the impossibility was not a result of his fault. In *Blount-Midyette*, because defendant had exclusive possession and control of the premises, and because the defendant pleaded impossibility and substantial performance, it had the burden of showing that the premises were destroyed without its fault.[53]

After all, what are the warehouse cases, at least in their contract context, but examples of impossibility of performance? In the warehouse cases, as in *Blount-Midyette*, the warehouseman, as a defense to the cause of action for return of the goods or damages in lieu thereof, is trying to show that it has become impossible to him to perform his contract, *i.e.*, to redeliver the warehoused merchandise. Impossibility is shown by proving that the goods in question were destroyed by casualty of one sort or another. And since the goods were at all times within his exclusive control and possession, he must show that the casualty was not the result of his fault, *i.e.*, that he himself did not cause the impossibility.

While the impossibility analogy should be determinative with regard to the contract action, it would not seem to help the bailor in those cases in which he brings a cause of action based upon the tort of negligence. In those cases, the rationale of Justice Traynor in *George v. Bekins*[54] should be enough to carry the day. It would appear to be anachronistic in the extreme to give determinative effect to the forms of action in a suit brought upon a warehousing arrangement. In both contract and tort, as mentioned earlier, the case resolves itself to a question of negligence. If the warehouseman was negligent, he is liable; if he was not, he is not. It is as simple

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[53] *Accord*, Sale v. Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); *See* Bergman v. Parker, 216 A.2d 581 (D.C. Ct. App. 1966); Hensler v. City of Los Angeles, 124 Cal. App. 71, 268 P.2d 12 (1954); Paddock v. Mason, 187 Va. 809, 48 S.E.2d 199 (1948); *Contra*, Joseph Constantine S. S. Line, Ltd. v. Imperial Smelting Corp., Ltd., [1942] A.C. 154. Viscount Simon, L.C., stated, as the rationale of his decision, that: "[W]hen 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically. The plaintiff sues for breach at a past date and the defendant pleads that at that date no contract existed. In this situation the plaintiff could only succeed if it were shown that the determination of the contract were due to the defendant's 'defualt,' and it would be a strange result if the party alleging this were not the party required to prove it." *Id.* at 163. *See* 6 A. CORBIN ON CONTRACTS § 1329 (1962) for a discussion of this case.

[54] *See* text accompanying notes 37-39 *supra*.

as that. To foist upon the plaintiff, who is not present at the time of the injury to his goods and who indeed may face an impossible task in trying to determine the cause of an injury which may have occurred many months before, the burden of affirmatively showing the negligence of the warehouseman may well be the same as creating a rule of absolute non-liability for warehousemen. Surely this was not the intent of the UWRA any more than it should have been the intent of the common law. If one is to bring any coherency and sense to this area, it must be held that the receipt-holder need only prove deposit, demand, and nondelivery, whatever the theory of his cause of action, and that it then falls to the warehouseman to prove both the cause of nondelivery and his freedom from fault.

The Uniform Commercial Code has attempted, in somewhat pusillanimous fashion, to resolve the burden of proof question in favor of the warehouseman. Section 7-403 of the Code provides, albeit in optional language, as follows:

> (1) The bailee must deliver the goods to a person entitled under the document... unless and to the extent that the bailee establishes any of the following: ... (b) damages to or delay, loss or destruction of the goods for which the bailee is not liable [, *but the burden of establishing negligence in such cases is on the person entitled under the document*]; ... (emphasis added)[55]

A "person entitled under the document" is, according to section 7-403(4), the "holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable document."

The comment to this subsection states that, by adopting the bracketed language, some states may wish to adopt the federal rule, which is "the rule laid down for interstate carriers in many federal cases." It is, the comment avers, "a cross reference to all the tort law that determines the varying responsibilities and standards of care applicable to commercial bailees."[56] The data available at this writing indicates that only one-fourth of the states which have adopted the Code have enacted the bracketed language.[57] Whether this indicates a legislative intent in those states which did not adopt the language to leave the common law, whatever it may have been, alone, or whether it indicates an intent to adopt sub silentio the contrary rule and place the burden on the warehouseman, is a matter that will have to be determined in the

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[55] UNIFORM COMMERCIAL CODE § 7-403.

[56] UNIFORM COMMERCIAL CODE § 7-403, Comment 3.

[57] California (but only in cases of "damage or destruction by fire"), Iowa, Kentucky, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas (but only in cases of fire), and Wyoming.

future. Be that as it may, it seems unfortunate that the draftsmen of the Code saw fit to place what may be characterized as an intolerable burden upon the holder of the receipt. The bracketed language, and the explanatory comments, may also be thought incorrect in light of *George v. Bekins* and in not seeing that that language goes much further than the draftsmen apparently thought it did. In those states which had adopted varying rules for cases sounding in tort and in contract, and which have adopted the optional Code language, the receipt-holder no longer has the advantage of being able to bring his action in contract, thereby throwing the burden of proving due care upon the warehouseman. Whether in tort or in contract, in those states, the receipt-holder will now, regardless of his theory of the case, have to carry the burden of proving the negligence of the warehouseman. Thus a distinct regression will have been brought about. Although, as the draftsmen state, "a restatement of this tort law would be beyond the scope of this Act."[58] one wonders if they realized that what they were doing was promulgating a new restatement, of contracts, at least with respect to procedural allocations of evidentiary burdens in contract cases involving the loss of goods evidenced by warehouse receipts.[59]

Whatever one may think of the rule promulgated by the optional language of the Code in section 7-403, it at least has the advantage of setting forth a definite and consistent rule for cases of this sort, taking away much of the confusion with which the courts were faced each time a case involving damaged, destroyed or lost goods came before it. The less room for maneuver that the courts have, the more reason there is to believe that there will be some uniformity. However, by its terms section 7-403 is not applicable to cases involving either the loss of goods for which there is no explanation or goods which were nonexistent at the time that the receipt was issued. These cases come closer to *P & G* than do those previously discussed, and the courts in that case would have been well advised to rely upon these cases in reaching their results.

There is hardly a plethora of cases dealing with situations analogous to that with which the courts were confronted in *P & G*. It may be to the credit of the warehouse industry that in most cases where there is a shortage of goods at the time of demand the warehouseman has been able to furnish an explanation of just how that shortage came about.

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58 UNIFORM COMMERCIAL CODE § 7-403, Comment 3.

59 With respect to the standard of care which the warehouseman must exercise, the UNIFORM COMMERCIAL CODE, in § 7-204, has made no substantive changes in § 21 of the UWRA. The warehouseman must now exercise such care "as a reasonably careful man" would exercise.

One of the few cases involving unexplained shortages of goods which admittedly were at one time in the warehouse grew out of a financing transaction in which warehouse receipts covering a large quantity of lumber were pledged as security for loans made by the receipt-holder to the depositor.[60] After a series of financing transactions in which nothing untoward had occurred, fire destroyed the greater portion of the warehoused property. An inventory revealed that there was not as much lumber in the warehouse prior to the fire as was represented by the receipts. The primary defense raised by the warehouseman was that it was exonerated from liability because it had issued the warehouse receipts in reliance upon representations of quantity made by the depositor to it.[61] The court considered and rejected this argument not so much because it was without merit if proven, upon which the court said little, but because the warehouseman had not shown that the shortage resulted from any such misrepresentations. "There was no evidence at all to prove the cause of the shortage," but "merely speculation concerning a number of possible causes."[62] This being so, the warehouseman had no lawful excuse by which it could exonerate itself from liability. And the burden of proving either that the missing lumber had never been deposited or that it had been misrepresented by the borrower was on the defendant. In other words, the warehouseman had not carried the initial "burden" of section 8 of the UWRA by proving that a "lawful excuse" existed for the failure to redeliver the lumber upon demand by the receipt holder. The reason for this result, the court stated, was that the warehouseman was in a better position to know and explain the cause of the loss than was the holder of the warehouse receipt. Furthermore, "the warehouseman is in the best position to prevent shortages."[63]

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[60] Scott v. Lawrence Warehouse Co., 227 Ore. 78, 360 P.2d 610 (1961). In Heekin Can Co. v. Kimbrough, 196 F. Supp. 912 (W.D. Ark. 1961), suit was brought by a supplier of the borrower-depositor against the field warehouseman, alleging that Lawrence had fraudulently conspired with the borrower to give it a better credit rating. Because the plaintiff was unsuccessful in proving fraud, its action failed. However, "It is not impossible that the seed which fell on barren ground in the *Heekin* case may, on another occasion, lodge in fertile soil." Gilmore, *supra* note 1, § 6.6 at 178. As to the warehouseman's right against the depositor for misrepresentations, *see* Lawrence Warehouse Co. v. Best Lumber Co., 202 Ore. 77, 271 P.2d 661 (1954).

[61] As is pointed out in Gilmore, *supra* note 1, § 6.6 at 175-6, this was hardly a defense "calculated to sell field warehousing services to banks." For, if the defense had been successful, all that a warehouseman would have to show to escape liability was that the shortages resulted from overcertification by the borrower.

[62] 227 Ore. at 88, 360 P.2d at 614.

[63] *Id.* at 90, 360 P.2d at 616.

This latter proposition can only be described as a gratuitous bit of *dicta*, one which only serves to obfuscate the issue. It may be germane to ask: Of what relevance is the ability of the warehouseman to prevent losses when the only consideration before the court was whether or not he has met his initial burden, that of showing that there is an excuse for his failure to deliver the merchandise in his custody to the receipt-holder? Only after that issue has been determined is the question of ability to prevent loss reached, *i.e.*, the presence or absence of the burden on the part of the warehouseman to show that he had exercised due care in storage of the goods. It is precisely this failure to distinguish between two separate and distinct issues that leads to the utter confusion which one gains from a review of the opinions discussing the liability of warehousemen for non-returned goods. Failure to show how the loss occurred is not negligence; it is only the failure to establish a "lawful excuse," a requirement of the UWRA, and part of the warehouse contract. Only after the excuse has been shown does negligence enter the case at all; and only then is section 21 of the UWRA referred to on the issue of due care or negligence. Thus, when the New York Court of Appeals had the *P & G* case before it, it had only to decide, as the Appellate Division really did, that the warehouseman had not met the statutory requirements of section 8. That it did not do so may be due to the theory of the complaint; nevertheless, the rationale adopted by that court does not do justice to the tricky problems which it had before it, particularly with reference to the question of damages. There is some authority for the proposition that the inability to present evidence of the manner in which the shortage or destruction of the goods came about is conclusive evidence of negligence.[64] This is not so, any more than the failure of a contracting party to present evidence of impossibility constitutes conclusive evidence of negligence on his part. All that such a failure shows is that there was no impossibility; all that the failure of the warehouseman to prove what happened to the goods shows is that he has no lawful excuse for his failure to return the goods.

However much fault may be found with the reasoning in *Scott v. Lawrence Warehouse Co.*,[65] at least it did conclude that the warehouseman was liable for failure to present a lawful excuse for the shortage. As far as this goes, the case was correctly decided.

The same, however, may not be said of *Nasif v. Lawrence Warehouse Co.*,[66] a case involving what has been termed "an exceedingly

[64] *E.g.*, Nasif v. Lawrence Warehouse Co., 122 F.Supp. 562 (S.D. Miss. 1954).

[65] 227 Ore. 78, 360 P.2d 610 (1961).

[66] 122 F.Supp. 562 (S.D. Miss. 1954).

sloppy operation both from the warehouse company's and the lender's point of view."[67] Once again we have a situation in which the warehouse company was unable to furnish any reason for the shortages which existed at the time demand was made by the holder of the receipts, a secured lender who had been financing the depositor. Rather than articulating the reasons for the liability imposed by the decision upon the warehouseman, the court remained silent with respect to its precise rationale. The only clue furnished by the court is the citation of a New Mexico case[68] which was concerned with the burden of proof of negligence in warehouse receipt cases, and which held that the warehouseman had the burden of proving freedom from fault in a case brought to impose liability upon it for failure to deliver the goods upon demand. The conclusion one may draw, therefore, from *Nasif* is that the court thought that the warehouseman had failed in some fashion to prove that it had exercised due care in the operation of the warehouse. Perhaps the "sloppy" operation had something to do with it, although if this is so the court is completely inarticulate about it. It seems better to attribute to this case a ratio decidendi that unexplained shortages ipso facto impute negligence to the warehouseman, and that the only thing he could have done to refute this imputation would have been to show the reason for the shortage. The fault with this sort of reasoning is that it ignores completely the provisions of section 8 of the UWRA, and, what is worse, confuses completely the very different cases of the "normal" type of warehouse case such as where the merchandise is destroyed by fire, and the more unusual case where a failure to deliver cannot be explained. If this line of reasoning were adopted in the typical fire case, a court applying *Nasif* would have to use the following rationale: the allegations by the bailor of deposit, demand and redelivery have raised a presumption of negligence on the part of the warehouseman, which he has rebutted by showing that the goods were destroyed by fire. This rebuttal then casts upon the bailor (or the warehouseman, in those jurisdictions where it has the burden of proving its due care) the burden of proving negligence. But negligence has already been rebutted, according to this rationale, by the showing of the fire. The court thus reaches the absurd position of having negligence rebutted while negligence remains to be proved. This is hardly a felicitous manner in which to attempt to bring some sense out of the unexplained shortage cases. As has already been explained, negligence has no part in a warehouse case until such time as the cause of the failure to redeliver has been shown with certainty.

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[67] Gilmore, *supra* note 1, § 6.6, at 176 n. 12.

[68] Cole v. Younger, 58 N.M. 211, 269 P.2d 1096 (1954).

Then, and only then, are the questions of negligence and the burden of proof with regard thereto reached.

This brings us, then, to a case characterized by the court which decided it as "the mystery of the missing oil."[69] Unfortunately, nothing more exotic was involved than "the case of the unexplained shortage" complicated in this instance, vitiating to some degree its value as precedent, by somewhat unusual contractual relationships between the bailor and the bailee. Sonneborn had entered into a contract with Monarch whereby the latter was to rent oil storage tanks to the former. The agreement provided that the oil was to remain the property of Sonneborn at all times until authorization was given Monarch by Sonneborn to ship oil to Sonneborn's customers. Pursuant to the arrangement, Sonneborn shipped oil by rail to the tanks and Monarch gave Sonneborn receipts, as required by the contract, "for the quantity of each grade of oil set forth in the notification by" Sonneborn to Monarch covering each shipment. However, and this is where there is a departure from the normal warehousing arrangement, Monarch was specifically relieved from any obligation to verify that the amount of the oil actually put in the storage tanks corresponded to the amount set forth in Sonneborn's notification of shipment to Monarch. Sometime during the term of the contract an unexplained loss of over 6,200 gallons of oil occurred, and Sonneborn sued Monarch to recover its value.

The Court of Common Pleas of Ohio, for purposes of argument, treated the arrangement between the parties as that of bailor-bailee, but found that the bailor "has failed to show by a preponderance of evidence that the loss of the oil was the result of any negligence on the part of [Monarch]."[70] This result was reached in the face of the admission by Monarch that the cause of the loss was wholly unexplained. Not too much attention was paid to the terms of the contract between the parties.

The Court of Appeals, however, paid more attention to the contractual arrangement between the parties in finding for the defendant, but was unable to resist the temptation of throwing in some superfluous language regarding the burden of proof in cases of unexplained losses. "[I]t is essential" the court opined, "that [the plaintiff] show receipt by defendant company of oil in some amount in excess of that accounted for."[71] The court did think, however, that in the normal warehousing arrangement the issuance

[69] L. Sonneborn Sons, Inc. v. Follmer, 47 Ohio L. Abs. 531, 70 N.E.2d 497 (Ct. App. 1946) aff'g 70 N.E.2d 495 (Ohio C.P. 1946).

[70] 70 N.E.2d at 497.

[71] 70 N.E.2d at 499.

of warehouse receipts by the warehouseman would require it to go forward to explain any shortage that eventually occurred and that, if it were unable to furnish such an explanation, it would be liable for the shortage that had occurred. Apparently, then, the quoted statement is not quite as broad as one would believe on first reading, for the fashion in which the bailor shows that the oil was received is by showing that the bailee has issued his receipts therefor.

The dicta thrown in by the court in this case is directly apposite to the rationale and holding of the Court of Appeals in *P & G*. One question not considered by either court is what would happen if the warehouseman were able to show conclusively that the goods had never been received into the warehouse. Could a warehouseman ever show this and still allege that it had been free from fault? It seems that in such a case, the warehouseman would have an almost insurmountable burden. Unless a court could conclude that a reasonable man would have been defrauded by the depositor in the situation before it, a doubtful holding at best, the showing by the warehouseman of non-receipt would have the effect of almost conclusively casting liability upon it. Having come up with a lawful excuse, it would be hard put to show that it had not been guilty of negligence.

The conclusion to be drawn from these cases is that the warehouseman, as was the case in *P & G*, must in the first instance furnish an excuse for his failure to redeliver the goods upon demand. If for no other reason, this is the burden placed upon him by section 8 of the UWRA, although the courts have, for some strange reason, been loathe to refer to it when considering cases of this nature. If they had had the perception to cite section 8 and say nothing more about the matter, much in the way of misdirected and confusing reasoning would have been avoided.

If the result in the "unexplained shortages" cases had been to invariably cast liability upon the warehouseman, much the same is true in those very few cases which have considered situations involving non-existent goods. At least in this area we have a section of the UWRA directed specifically at such cases. Section 20 provides, *inter alia*, that "[a] warehouseman shall be liable to the holder of a receipt... for damages caused by the nonexistence of the goods...."[72] There is no corresponding relief from liability by showing due care for the warehouseman as there is in section 8. While some argument could be made for concluding that the "lawful excuse" of section 8 encompasses the fraud of the depositor in get-

[72] UWRA § 20.

ting the warehouseman to issue receipts for non-existent goods, the separate treatment of non-existent goods by the UWRA militates strongly against this result. Thus, section 20 is an absolute liability section: once the holder of the receipt shows that the goods purportedly represented thereby had no existence, liability on the part of the warehouseman follows as a matter of course.[73]

The only case dealing specifically with this aspect of section 20 has held that that section contemplates nonexistence at the time that the receipt was issued, which seems logical.[74] If the rule contemplated nonexistence at the time of the demand, or indeed at any time after deposit, there would be a severe conflict between section 20 and section 8; and one that is avoided by an interpretation such as that given it.

The only cases discovered involving nonexistent goods arose some time ago, and all grew out of the pledges as collateral of fraudulent receipts by the president of the warehouse company whose receipts he had caused to be issued.[75] While the results of the cases differed because of notions of agency and notice, the underlying assumption of all these cases was that if the plaintiffs could prove that they were holders in due course of the receipts in questions, the liability of the warehouseman would follow. The parties themselves did not dispute this. Thus, for example, if the defendant

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[73] Another pro-warehouseman change has been made in the UNIFORM COMMERCIAL CODE. Section 7-203 provides: "A party to or purchaser for value in good faith of a document of title... relying... upon the description therein of the goods may recover from the issuer damages caused by the non-receipt... of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received...." The Comment to this section erroneously states that "This section is a simplified restatement of existing law...." Section 20 of the UWRA permitted escape from liability for the warehouseman only for the "failure of the goods to correspond with the description thereof in the receipt," but not for non-existent goods. If it is assumed that the draftsmen of the Code intended "non-receipt" to correspond to "nonexistence" it is clear that the law has been substantially changed. If this interpretation is correct, then all the warehouseman will ever have to do to escape all liability for non-existent goods would be to change the form of its warehouse receipts to correspond to § 7-203. Thus, if the warehouseman uses such a form and shows that the goods were never received, it will have escaped liability, and the "iniquity" of the Appellate Division will have indeed come to exist. *See* note 51 *supra.*

[74] Lamborn & Co. v. Livingston, 245 Ill. App. 498 (1927).

[75] Corn Exchange Bank v. American Dock & Trust Co., 149 N.Y. 174, 43 N.E. 915 (1896); Hanover Nat'l Bank v. American Dock & Trust Co., 148 N.Y. 612, 43 N.E. 72 (1896); Bank of New York v. American Dock & Trust Co., 143 N.Y. 559, 38 N.E. 713 (1894).

warehousemen in *P & G* had been able to show the the oil never found its way into the warehouse tanks, or that indeed the oil never existed, they would hardly have improved their position from what it was as reported in the opinions detailed above. What would it have profited them to prove the nonexistence of the oil if they would have been held liable upon such a showing?

In a situation involving non-existent goods, it might be argued by the warehouseman, as it is by Professor Corbin, that "[a]ntecedent impossibility, in the objective, absolute sense ... of rendering a performance that is promised, prevents the promise from being enforceable as a contract."[76] There being no possibility of performance by the warehouseman at the time he issued the receipt, the receipt is nugatory and was never effective as a contract. Two possible responses to this contention are readily apparent. First, as stated by Professor Williston:

> It is sometimes said that if the agreement is impossible in itself, it is void. This, however, does not seem necessarily true. Doubtless if the parties know of the impossibility, they will not make such an agreement.... If unknown to both parties there is little occasion to distinguish existing impossibility from supervening impossibility. Parties deal with unknown present situations on the same basis as future contingent occurrences, and the law of contracts should adopt this method of dealing with them. There is, therefore, no more difficulty in finding a binding contract to perform something in fact impossible from the outset, if the facts or their import are unknown to the parties, than there is in making a contract in which a promisor takes the risk of supervening impossibility.[77]

Secondly, section 456 of the Restatement of Contracts,[78] which at first reading seems to support the view of Professor Corbin contains the caveat that its rule will apply only where the "promisor neither knows nor has reason to know" that his promise is impossible of performance at the time it is made.[79] It is undoubtedly with a like supposition in mind that section 20 of the UWRA was drafted. It is almost unthinkable that a warehouseman would issue a receipt for non-existent goods if it were not overwhelmingly at fault in permitting itself to be hoodwinked or defrauded by the depositor. Thus, any warehouseman issuing a receipt for non-existent goods will be considered to have known or have had reason to know that the goods were not in existence, and that his promise is impossible to perform and will continue to be so.

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[76] 6 A. CORBIN, CORBIN ON CONTRACTS § 1326 (1962).

[77] 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1933 (rev. ed. 1938).

[78] RESTATEMENT OF CONTRACTS § 456 (1932).

[79] *Id.*

In the three areas of warehouse litigation—casualty or "lawful excuse", unexplained shortage, and non-existent goods—it is clear that the warehouseman can prevail only in the first class, and then only if it is ultimately determined either that the plaintiff has not shown negligence or that the warehouseman has proved that he exercised due care. This is as it should be. In the first class of cases, it has been demonstrated that the warehouseman is most certainly in the better position to explain both the loss and its cause. Indeed, it is impossible for the plaintiff in the overwhelming majority of cases ever to carry the burden of proving the negligence of the warehouseman in its care of the goods. In the second class of cases, the warehouseman has, almost by definition, been guilty of negligence. The same is true of the third class, but for the shocking favoritism shown the warehouseman by section 7-203 of the Uniform Commercial Code.[80]

The warehouseman has, after all, undertaken a serious responsibility when he issues his warehouse receipts. These receipts will be relied upon both by secured sellers and secured lenders. If the warehouseman were able to escape liability by a mere showing that he does not know what happened to the merchandise in his custody or whether in fact it ever existed, not only would commercial lines of credit be severely disrupted, but it is safe to assume that field warehousing would become a thing of the past.

III. DAMAGES

The inconsistency of rationale which characterized the opinions of the Appellate Division and Court of Appeals in *P & G* with respect to the theory of the warehouseman's liability is to be found in exacerbated form in their discussions of the quantum of damages. Put simply, the question before the courts for determination was, which of two measures of damages should apply: (1) the market value (or full value stated on the warehouse receipts) of the commodities covered by the receipts, or (2) the then outstanding balance of the loans (or, in the case of the sellers, the then unpaid purchase price) owing by Allied. A subsidiary question was whether damages should vary with the ultimate determination of whether the salad oil was or was not ever in the field warehouse. The trial court had granted summary judgment for the stated value of the salad oil; the Appellate Division reversed and remanded for redetermination of damages; and the Court of Appeals reversed the Appellate Division on the question of damages, reinstating the judgment and award of the trial court.

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[80] *See* note 73 *supra.*

As has been shown,[81] the preoccupation by both counsel and the courts with the theory of conversion caused the misdirected discussion regarding the liability of the warehousemen. The same may be said of the discussions of damages. While the quantum of damages ultimately awarded by the Court of Appeals may be correct, at least in part, the route which was used to reach this result leaves much to be desired in terms of rationale. Again, if the case had been analyzed in terms of breach of contract, it would not have been overly difficult to reach a reasonable and justifiable result respecting damages. The issues then would have been seen to be not as complex as the courts thought they were and a good portion of the confusion engendered by counsel could have been transcended.

The Appellate Division was preoccupied and distracted by the inability of either party to show whether the goods had ever been delivered to defendant's warehouse, or whether the receipts had been issued for non-existent salad oil. A remand was therefore called for because

> in the present state of the proof on summary judgment motion plaintiffs may recover only their actual losses at the time of Field's failure to comply with their several demands, rather than the stated value of the warehouse receipts or the market value of the quantities of oil stipulated in such receipts, so long as they are unable to show that the oil was actually delivered in bailment and was thereafter removed unlawfully.[82]

Thus, if the plaintiffs were able ultimately to show that the oil had been in the warehouse and then removed, their measure of damages would be greater than if they were unable to do so. The court also held that in either event, fair market value is to be measured at the time of demand and refusal to redeliver. What is more, the burden of showing actual receipt was to be placed upon the plaintiffs. Why the burden of this showing should be upon plaintiffs when the question of damages is involved, while it was upon the defendant when the court was allocating burdens of proof when dealing with the warehouseman's liability,[83] is unexplained.

It is the general rule in conversion that the converter is liable for the full fair market value of the converted goods at the time and place of the conversion.[84] There are some exceptions to this

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[81] *See* Part II *supra.*

[82] 22 App. Div. 2d 420, 423-24, 255 N.Y.S.2d 788, 793 (1965).

[83] *See* text accompanying notes 15-17 *supra.*

[84] Zemel v. Commercial Warehouses, 132 N.J.L. 341, 40 A.2d 642 (1945); Chatterton v. Boone, 81 Cal. App. 2d 943, 185 P.2d 610 (1947); Sewell v. Federal Compress & Warehouse Co., 194 Ark. 199, 106 S.W.2d 209

rule, particularly in the case of goods of fluctuating value,[85] but it is generally applicable, even in cases in which the plaintiff is the holder of a "special interest" in the chattels which have been converted.[86] Such a "special interest" includes a mortgage or other lien, the interest of a conditional vendor or vendee, and the like. The holder of such an interest, although it be for an amount less than the face value of the chattel, may usually recover the full market value of the converted property, being treated for these purposes in the same fashion as the holder of the entire ownership interest in the property.[87] It was this rule that the plaintiffs were

(1937); Keating v. F. H. Peavey & Co., 71 N.D. 517, 3 N.W.2d 104 (1942). *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS, §§ 2.36-.38 (1956).

85 Logan Co. Nat'l Bank v. Townsend, 139 U.S. 67 (1891); United States v. Merchants Mutual Bonding Co., 242 F. Supp. 465 (N.D.Iowa 1965); UUnited States v. Farmers Seed & Feed Co., 181 F. Supp, 475 (M.D. Ga. 1959); Kvame v. Farmers Co-Op Elev. Co., 68 N.D. 439, 281 N.W. 52 (1938); Sproul v. Sloan, 241 Pa. 284, 88 A. 501 (1913); Cochran v. Wool Growers Central Storage Co., 140 Tex. 184, 166 S.W.2d 904 (1942). *See generally,* Note, *Measure of Damages for Conversion of Property of Fluctuating Value,* 32 KY. L.J. 358 (1944).

86 Scott v. Lawrence Warehouse Co., 227 Ore. 78, 360 P.2d 610 (1961); Einstein v. Dunn, 61 App. Div. 195, 70 N.Y.S. 520 (1901), *aff'd on opinion below,* 171 N.Y. 648, 63 N.E. 1116 (1902).

87 Williams v. Flagg Storage Warehouse Co., 128 Misc. 566, 220 N.Y.S. 124, *aff'd* 221 App. Div. 788, 223 N.Y.S. 925 (1927); Mechanics & Traders' Bank v. Farmers & Mechanics' Nat'l Bank, 60 N.Y. 40 (1875); Einstein v. Dunn, 61 App. Div. 195, 70 N.Y.S. 520 (1901).

Professor McCormick states that: "If the plaintiff is not the absolute owner of the chattel, but holds only a limited interest, such as that of a pledgee or of a purchaser under a conditional sale, then, if he sues one as converter who is a stranger to the title, and if the plaintiff was in possession of the chattel when it was converted, the plaintiff may recover the full value of the chattel as if he were the absolute owner. If, on the other hand the converter is one who himself holds the remaining interest in the chattel, as in case of the wrongful retaking and resale of an automobile by the seller under a conditional sale agreement, then the plaintiff recovers only the value of his limited interest." C. O. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 123, at 464-65 (1935) (footnotes omitted).

The varying rules, which depend in their application on the status occupied by the defendant, are necessary because of the concomitant rule that the holder of the special interest, if he recovers more than his debt and any damages incidental by reason of the conversion, must account for the excess to the holder of the general interest. To avoid circuity of action, if the defendant is the holder of the general interest, the balance which would be due him is subtracted from the value of the converted chattel which would otherwise be recoverable by the plaintiff. *See e.g.* Parish v. Wheeler, 22 N.Y. 494 (1860) (mortgagor v. mortgagee); First Nat'l Bank v. Broder, 107 Conn. 574, 141 A. 861 (1928) (lender v. debtor); Campbell & Setzer v. Clark & Melia, Inc., 150 Pa. Super. 635, 29 A.2d 350 (1942) (lessee v. lessor);

relying upon in order to recover the full stated value of the merchandise represented by the warehouse receipts.

The only thing wrong with reliance upon this theory, thought the Appellate Division, was that the plaintiffs had not shown that a conversion had in fact taken place. If they were ultimately unable to show this, they would be permitted to recover only the amount that they had lost—the amount of the loan, or purchase price, then unpaid and owing by Allied. For if indeed the receipts had been issued for non-existent goods, what was there to convert? Furthermore, the court thought that the general rule regarding damages in conversion was inapplicable to this case in any event, even if the plaintiffs were able to show that the salad oil had been placed in the warehouse. After noting that if the plaintiffs were permitted to recover the full stated or market value of the salad oil, they would have to account to Allied for any excess over and above sums due them from Allied, the court thought that it would be unjust for the "special owners" to be permitted to recover this excess:

> There are, however, exceptions to the general rule.... [I]t is not applied in special circumstances where justice requires that the owner of a special interest recover only for the harm suffered.... This exception may be relevant to the extent that Allied was the purchaser or general owner of much of the oil involved. It would be manifestly unjust to permit any holder to recover in excess of its own loss, only so that it may account for such excess to Allied, against whom, as the alleged perpetrator of the fraudulent conspiracy, Field contends it could assert the defense of fraud. The recovery of the special owner is always so limited when the defendant himself has obtained an interest from the general owner and will himself be entitled to a portion of the total value....[88]

What this language overlooks is that the "harm" which the plaintiffs had suffered could not be determined in a suit to which Allied was not a party. Any measurement of the amount of the unpaid loans or purchase price would not be res adjudicata against Allied in a later suit by Allied against either the plaintiffs or defendant for any excess due it, over and above such harm. It is also to be noted that "harm" does not only include the unpaid portions of the obligations owing the plaintiffs by Allied, but also includes any damages, incidental or otherwise, granted to the plaintiffs by the Uniform Commercial Code or other relevant state law. More-

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Commercial Auto Loan Corp. v. Baker, 73 Ga. App. 534, 37 S.E.2d 636 (1946) (conditional vendee v. conditional vendor); Barham v. Standridge, 201 Ark. 1143, 148 S.W.2d 648 (1941) (mortgagor v. mortgagee); First Nat'l Bank v. Booth, 77 Colo. 122, 235 P. 570 (1925) (mortgagor v. mortgagee).

88 22 App. Div. 2d 420, 433, 255 N..Y.S.2d 788, 801 (1965).

over, it is difficult to see what "interest" the warehouseman had *in the oil.* While the defendant in this case may be admitted to have a cause of action against Allied for any damages it may suffer because of Allied's fraud, this alone would not give the warehouseman an interest in the property which it had been engaged to warehouse and protect.[89] The case cited by the Appellate Division in support of this proposition may be seen to stop far short of the efficacy given it.[90] Some of these things were seen by the Court of Appeals in its discussion of the opinion of the Appellate Division.

Finally, the Appellate Division held that the amount of plaintiffs' recovery must be further reduced, in the case of the secured sellers, by the down payment made by Allied on the purchase price of the oil. The secured sellers were to receive damages measured by the contract price to Allied less any down payments, such damages, however, not to exceed the market value of the oil on the date that the defendant defaulted in complying with the demand for delivery of the oil. As to the secured lenders, they should show the amount of their indebtedness, which they should recover, but again, recovery was to be limited to an amount not to exceed the value of the oil on the date of demand, or, in other words, "the lesser of market value or the value of the secured indebtedness."[91]

The Court of Appeals found fault with almost everything that the Appellate Division had had to say on the issue of damages.

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89 Not taking into consideration, of course, the warehouseman's lien granted by § 7-209 of the Uniform Commercial Code. *But cf.* Central R.R. v. Bayway Ref'g Co., 81 N.J.L. 456, 79 A. 292 (1911).

90 Parish v. Wheeler, 22 N.Y. 494 (1860), was a case in which a mortgagee of certain chattels was suing for conversion, against a party whom the court treated for purposes of its discussion of damages as the mortgagor. *Id.* at 511. Comstock, C. J. stated that: "In the common law action of trover, the measure of damages, it is true, was usually the value of the property converted.... A mortgagee, having the right of possession before forfeiture, and the absolute legal title afterwards, could sue in trover for the conversion of the chattel mortgaged, and, without regard to the amount of his debt, could recover the full value against a stranger guilty of such conversion.... [However] in trover by the mortgagee against the mortgagor, the damages should not exceed the amount of the debt. This is a conclusion which avoids a circuity of remedies...." *Id.* at 511-12.

In *P & G*, on the other hand, there is no way in which the warehouseman can be treated either as the mortgagor or in privity with him. In fact, the Appellate Division specifically refused to decide whether the fact that Allied had delivered the oil to warehouseman was an act sufficient to establish that kind of privity which might make some of the dicta in Parish v. Wheeler applicable. 22 App. Div. 2d 420, 433-34, 255 N.Y.S.2d 788, 801 (1965).

91 22 App. Div. 2d at 434-35, 255 N.Y.S.2d at 803.

First, as has been noted, the Appellate Division had held that the market value of the oil was to be fixed on the date when the bailors received notice that their demand for delivery was not to be complied with. But because the bailee was the party who would be more likely to be able to establish the circumstances surrounding the disappearance of the bailed property, which it was not able to do in this case, "it ought not to lie in the power of the bailee to choose the date for determining market value by electing when to notify the bailor that the goods have disappeared and cannot be accounted for."[92] The burden of showing the date of the loss, then, is properly placed back where it should be: on the warehouseman. The rule that the loss is to be measured as of the date of the conversion, when that date is known, is not applicable here. For that principle to be germane, the date of the conversion must be known to the parties. If the bailee could choose the date when it elects to notify the bailor of the loss, (subject only to the power of the holder of the warehouse receipt to make a demand for delivery before the warehouseman would have otherwise notified him of the loss) thereby being given the power to fix the measure of damages, it "would place the bailee in a better legal position by pleading ignorance of the circumstances of the loss then if he knew or revealed the circumstances."[93] The court therefore concluded that

> [i]n order that a bailee may not be permitted to take advantage of his own wrong where the subject of the bailment has been negligently lost or misappropriated, it follows that the bailor should be awarded damages measured by the highest value of the property between the date when the bailment commenced and the date when the bailor has received notice that the property has been lost.[94]

In this case, because there had been no showing that the value of the salad oil increased significantly between the date the receipts were issued and the date upon which the plaintiffs had been notified of the loss, the value of the oil, for purposes of a determination of the quantum of damages, had been established by the value thereof stated on the warehouse receipts.

It is difficult to fault this reasoning, given the context in which it was used. The bottom had fallen out of the salad oil market when it became generally known that a gigantic fraud had occurred in Allied's dealings in that commodity. The Appellate Division, in determining value as of the date of notification to the bailors of the loss had given a substantial windfall to the ware-

92 16 N.Y.S.2d 344, 352, 213 N.E.2d 873, 877 (1965).

93 *Id.*

94 *Id.*

houseman, one that the Court of Appeals justly thought was unwarranted. In the typical warehouse situation, the warehouseman is generally able to fix with some certainty the date upon which the loss (or the conversion, to use the terminology of the New York courts) had occurred. It is this date which the general conversion rule of damages takes as relevant, indeed crucial, in measuring fair market value. Had that date been known in the instant case, there would have been no problem in fixing damages. At that time the oil was removed (using the rationale of the Court of Appeals) the market generally was not aware that manipulations had been taking place, and value would have been unaffected by later declines in the market price of salad oil. Presumably, knowledge of the general situation became known to the market at large only sometime after the disappearance. The Court of Appeals simply held that the date of general knowledge should not be determinative; the date of the loss of the oil was. And because the warehouseman is not able to show what that date was, the Court was prepared to assume that all the missing oil had been taken on that date when the market value of salad oil was at its peak.

This "highest value in the interim" rule is not unknown to New York courts, although it had usually been applied only in situations involving goods of fluctuating value.[95] The underlying rationale of these cases is that where the conversion had resulted in the inability of the bailor to obtain the most favorable price for his merchandise (which the court assumes he would have done, having the perspicacity to sell at the market peak, if only he had been able to reclaim the goods at that time) justice requires that this loss be made up to the bailor by the bailee. While the bailee had not been guilty of a "wrong", nevertheless it was his negligence that caused this loss of profit, for which the bailor must be compensated. There is thus built into this measure of damages the maximum profit which the bailee could have made if the warehouseman had not breached his obligation to redeliver the bailed merchandise upon demand. Much the same feeling pervades the opinion of the Court of Appeals in *P & G*. The warehouseman had been so negligent that it was not even able to fix the date upon which the oil was misappropriated, and it should therefore bear the brunt of the invocation of the highest value rule. In any event, there is absolutely no reason for the warehouseman to be able to reap the benefit of the catastrophic decline in prices, which decline it had in no small part helped to bring about. (It is interesting to specu-

[95] Mayer v. Monzo, 221 N.Y. 442, 117 N.E. 948 (1917); Mullen v. J. J. Quinlan & Co., 195 N.Y. 109, 87 N.E. 1078 (1909); Wright v. Bank of the Metropolis, 110 N.Y. 237, 18 N.E. 79 (1888).

late why the warehouseman did not enter upon the market after the decline and "cover" for the salad oil which it had promised, but was unable, to deliver. Perhaps quantities sufficiently large to cover were not available; or, more likely, the bankruptcy trustee of Field was not about to expend the assets of the estate for the benefit of a few "secured" creditors).

Thus, we now have one ingredient of the measure of damages—value of the oil which the warehouseman was unable to redeliver. This measure is the one which would have been appropriate if, as has been contended,[96] a breach of contract analysis had been used in the decision of this case. For if contract damages are intended to measure the loss which the injured party has suffered, the value of the salad oil being an integral part in the determination of that loss, the court's discussion of value would have been as apposite to a discussion of contract damages as it was in its discussion of conversion damages. It might be contended that, if the oil were present in the warehouse at the time of demand, the plaintiffs would have received oil worth much less than the ultimate measure of recovery given them in the Court of Appeals. This argument, upon closer analysis, falls of its own weight, much as did an analogous argument made by the defendant in *P & G*. Again, there will be an implied duty on the part of the warehouseman—a condition of cooperation, if you will—to notify the holders of the receipts when the loss is discovered. Again, it is that date upon which value will be determined, not at some later date when the warehouse receipt holder is notified that a loss had taken place and that the warehouseman will be unable to perform his contract. Value, and date of value, then, will be identical in a contract case as it was in a conversion case.

Next, the Court of Appeals turned its attention to the question of crediting plaintiff's recovery against the warehouseman with the amount of Allied's down payment.

> Whoever owns this [down payment], it does not belong to Field. It belongs either to plaintiff or to Allied or parts of it to each. Consequently Field is not entitled to be credited with this sum in reduction of its liability to plaintiff for nondelivery of the oil to which plaintiff was entitled under its warehouse receipts. Allied is not a party to this action, therefore it cannot be decided in this action how much of the [down payment] belongs to the trustee in bankruptcy of Allied or to the plaintiff.[97]

Furthermore, it could not readily be determined in this action whether or not Allied was entitled to recover, as a defaulting pur-

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[96] *See* Part II *supra*.

[97] 16 N.Y.2d 344, 353, 213 N.E.2d 873, 877 (1965).

chaser, part of the down payment which it had made to P & G. While section 2-718(2) (b) of the Uniform Commercial Code promulgates guidelines regarding the rights of a defaulting purchaser to the refund of a part of his down payment, that is a matter for determination in a suit between plaintiff and Allied's trustee in bankruptcy. "Manifestly, if Allied defaulted on these contracts, plaintiff was entitled to retain as against Allied so much of the [down payment] as would be necessary to offset its damages due to a falling market plus incidental damages, such as extra transportation, storage, legal expense, and other items to which it was subjected by Allied's default."[98] The decision of the Appellate Division had again resulted in a windfall for the warehouseman, which the court thought abhorrent in these circumstances. The law was clear, the court thought, that the holder of a special interest in the property (here, the unpaid vendor) was entitled to recover the full market value of the warehoused commodities which, it had already held, had been converted by the warehouseman. After P & G had recovered it would, of course, be held accountable for some sum to Allied, the holder of the remaining interest in the property. But the rights and duties of plaintiff *vis-à-vis* Allied could not be determined in this suit, to which Allied was not a party.

> The difficulty... with the reasoning of the Appellate Division is that it prejudges the rights and liabilities between plaintiff and Allied without Allied's being before the court, and gives the benefit to defendant without recourse by plaintiff to protect itself against whatever personal liability plaintiff might be under to return part of the deposit to Allied or its trustee in bankruptcy, and to whatever portion of the [down payment] plaintiff might have been entitled to retain by reason of Allied's default. defendant cannot be credited with part of a down payment which plaintiff may be required to restore to Allied's estate in bankruptcy, nor is defendant entitled to be credited with whatever portion of the [down payment] plaintiff is entitled to retain to compensate it for damages against Allied due to Allied's breach of contract.[99]

It is interesting, to say the least, to find that the court must, despite itself, inexorably find itself drawn into the web of the law of contracts regarding the question of damages. The court does not overtly mention this inconsistency. As hard as it tries, the court cannot avoid reference to the Uniform Commercial Code which, after all, deals with "transactions in goods"[100] generally, and more specifically in section 2-718(2), with sales of goods. This mixing of conversion and contract must have been most embarassing to the court, if indeed it realized that it was dealing in non sequiturs.

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98 *Id.* at 354-55, 213 N.E.2d at 878.

99 *Id.* at 355-56, 213 N.E.2d at 879.

100 UNIFORM COMMERCIAL CODE § 2-102.

It must also be noted that the result of the court's refusal to subtract the down payment from *P & G's* recovery is to make *P & G* a secured creditor for the amount of damages which it might be permitted to recover against Allied's bankruptcy estate for injury which resulted from Allied's default in its contract of purchase. If we assume that the stated or fair market value of the oil is equal to or approximates closely the purchase price, *P & G* (assuming recovery of damages in full from the warehouseman or, more likely, its insurer) would have in its posession 120% of the purchase price of the oil. If the decision of the Appellate Division had been followed, *P & G* would have recovered only the unpaid portion of the full purchase price of the oil, (subject to the maximum of the market value of the oil) giving it 100% of that price. *P & G* would, in that case, have had to file a claim with Allied's estate for any damages suffered as a result of Allied's default, while Allied's trustee would have counterclaimed for any monies due it in exercise of its rights under the Uniform Commercial Code. Perhaps having possession of more than the purchase price might be considered a windfall to the seller, even more so than the warehouseman would have received under the rationale of the Appellate Division. Nevertheless, it is clear that, under ordinary contract notions of damages, the same "windfall" to the secured seller would have resulted had the contract been performed as agreed by the warehouseman. For, if Field had been able to deliver the oil, *P & G* would have had all the oil which it had sold to Allied, in addition to the down payment already in its possession. Due to the disastrous decline in market prices, the oil would have been worth far less than the stated value on the warehouse receipts; therefore, the seller would have had an action against Allied for losses suffered when it attempted to cover on the market (the difference between the contract price and the market price at the time and place of tender)[101] plus any incidental damages it might have suffered. But the important thing is that *P & G* would have gotten the entire amount of oil covered by the warehouse receipts and, but for the decline in prices, would have had the oil plus the 20% down payment. This is precisely where the decision of the Court of Appeals puts it. Having left its conversion theories, albeit sub rosa, the court arrives at a conclusion identical with that which it would have reached had it been talking contract instead of tort. Professor Corbin has suggested that "[i]n determining the amount of... the 'damages' to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised."[102] If that is true, then the correct result

[101] UNIFORM COMMERCIAL CODE § 2-708.

[102] 5 A. CORBIN, CORBIN ON CONTRACTS § 992 (1964).

was reached in *P & G*, unfortunately by a more circuitous and troubled route than was necessary.

Finally, the Court of Appeals felt that the Appellate Division had erred in assuming that this situation was like that in *Corn Exchange Bank v. American Dock & Trust Co.*[103] where, it will be remembered, warehouse receipts had been issued for nonexistent merchandise. In that case, it had been held that the lender was permitted to recover only the losses which it had sustained in making the loans to its borrower:

> The defendant is required to respond in damages because of the authority that had been given its agent, [the borrower], and not by reason of the fact that it had the cotton in storage. The company had been defrauded by [the borrower], but still it is required to make good the losses sustained by the plaintiff. The recovery, therefore, should have been limited to the amount of the loan and interest.[104]

Reverting to the language of conversion, the Court of Appeals in *P & G* said that there was no conversion in *Corn Exchange Bank*, because there were no goods to convert. Thus, the conversion rule of damages could not be applied in that case or in cases like it, for the reason that no property had been converted. Furthermore, the Court thought that the conversion rule in the case of nonexistent property would most certainly result in a permanent windfall to the secured lender or seller. There being no goods, there was no holder of the "general proprietary interest, since there was no such interest and no such person was in existence."[105] Harking back to its holding on the question of liability, the *Corn Exchange Bank* analogy was not present here because there was no basis for holding that the salad oil had never been received into defendant's warehouse. The court concluded:

> Where, as here, the bailed merchandise was in existence and traced into the possession of the warehouseman, and has later been converted, there is no basis for applying the rule in the *Corn Exchange Bank* case, (where there never were any goods and never was any conversion). Instead, the *Mechanics & Traders' Bank* rule applies that where there has been conversion of merchandise, the holder of the warehouse receipt is entitled to recover for the full value of the merchandise, and the holder of the receipt must then fulfill his obligations to other contracting parties who were not, themselves, entitled to possession of the merchandise at the time of its conversion.[106]

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103 163 N.Y. 332, 57 N.E. 477 (1900).

104 *Id.* at 339, 57 N.E. at 479-80.

105 16 N.Y.2d 344, 356-57, 213 N.E.2d 873, 879 (1965).

106 *Id.* at 357-58, 213 N.E.2d at 880.

The applicability of the contract rationale in impossibility cases has already been discussed.[107] In that discussion it was pointed out that, where liability of a promisor is concerned in cases such as the present, where the warehouseman should have known that the merchandise for which it was issuing receipts was not in existence, there is no difference between impossibility at the time of the promise and impossibility due to subsequent events. The same is true where the question of damages is concerned. Because the impossibility in the non-existent goods situation cannot be used as exculpation by the warehouseman, the measure of damages should be identical with that at which the court should arrive in cases concerned with subsequent loss of the goods. No relief should be given the warehouseman in either situation; certainly not in the nonexistent goods case. Recovery should not be limited to the amount of the loan or unpaid purchase price, any more than it should be so limited where the impossibility came about at some point after the promise had been made.

Furthermore, the value at the highest point in the interim rule should also be applied in breach of contract actions. The conversion rule takes the value at the time that the property was converted, not at the time that the demand was made. What the courts have done in those cases is treat the demand as having been made at the time that the goods were lost. In a contract action, the same should be true. Where the warehouseman chooses not to notify the receipt-holder of the loss, he has breached what has heretofore been termed an implied condition of cooperation; the breach of the contract took place, then, not when redelivery was refused, but at the time this implied condition was breached; *i.e.*, at the time the goods were lost or harmed. Where the warehouseman does not notify the bailor, so that he may take the appropriate steps to keep his losses to a minimum, or where the warehouseman does not know that the goods are missing, and this lack of knowledge is taken as conclusive proof of fault, as was the case in *P & G*, there again a court should measure value at the time of the loss, or where the time of loss is unknown, at the highest market value between the time that the promise was made and the time that the bailor is notified that the goods are gone. And this should be the rule even where the goods which the warehouseman had promised to redeliver were never in existence.

It is believed that only by applying contract principles and using the language of contract can rationality be brought to an area in which we will probably see much more in the way of litigation than had previously been the case.

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[107] *See* text accompanying notes 52-54 *supra*.

> The duties and potential liabilities of the field warehouseman—who, as a buffer between borrower and lender, occupies a unique position—are just beginning to come into discussion in the rapidly developing case law. We shall no doubt hear a good deal more about them.[108]

And, if what we are to hear is to serve any useful purpose in defining those duties and liabilities in a manner which will lend itself to coherent analysis and predictive rationale, the courts must abandon the conversion theories which have for so long bedeviled the whole arena of warehouseman's liability and turn to a contract context bringing with it the concomitant rationality which should underlie any field of law.

[108] 1 Gilmore, *supra* note 1, at 195.