mission and Crabb[14] thought access to a highway was a benefit to a person or his estate and even thought there was an advantage gained by proximity.

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BAILEES — POWER OF SALE — LIENS — SECTIONS 5-9, LIENS ON GOODS AND CHATTELS ACT — R.S.C. ORD. 50, R. 2.

The purpose of this note is to discuss certain defects in the law regarding the rights of bailees to sell bailed property. The facts of *Sachs v. Miklos*[1] provide a convenient point of departure. In 1940 the defendant consented to store in her house furniture belonging to the plaintiff without making any charge for the service. In 1943 the defendant required the room in which the furniture was stored. She obtained from the plaintiff's bank manager an address where he might be found, wrote to him twice and attempted more than once to communicate with him by telephone. The letters having been returned to her, she sent the furniture to the second defendants, a firm of auctioneers, who sold it for £15. In 1946 the plaintiff demanded the return of his furniture and then brought action. The defendants, the bailee and the auctioneers, were both found liable in conversion because they were found not to be agents of necessity, since there was no emergency and the goods were not perishable.

At common law a bailee's power of sale was restricted to situations of necessity and possibly only to carriers. Further, the power was limited to perishable goods and could only be exercised in the best interests of the owner, not of the bailee. In addition a real necessity had to exist for the sale and it had to be practically (commercially) impossible to get the owner's instructions in time as to what should be done.[2]

Recent statutes, however, have made provision giving powers of sale to certain bailees. Examples are the Inn-Keepers Act[3] and the Warehouseman's Lien Act.[4] The Liens on Goods and Chattels Act[5] contains more general provisions. It first gives a lien to persons who have done work on chattels, jewellers, wharfingers and gratuitous bailees, and then provides a power of sale for these persons. The lien of the gratuitous bailee and the power of sale

14. (1916) 37 O.L.R. 656.

1. [1948] 2 K.B. 43.

2. *Sims v. Midland Ry.* [1913] 1 K.B. 103; for a discussion of agency of necessity, see Cheshire and Fifoot, The Law of Contract (1956), 4th ed., pp. 387-8.

3. R.S.N.B., 1952, c. 111, s. 2.

4. R.S.N.B., 1952, c. 247, s. 4.

5. R.S.N.B., 1952, c. 131, ss. 2, 3, 4, 5 and 9.

require more detailed discussion. The problem concerning the power of sale affects other bailees given liens under the Act, but for simplicity it will be dealt with only in connection with gratuitous bailees.

Section 5(1) of the Act reads as follows:

> A gratuitous bailee of goods shall have a particular lien on the same for his reasonable charges for caring for them after the expiration of the time mentioned in a notice given by him to the bailor to take possession of the goods.

Section 5(2) gives a judge power to dispense with the notice if the bailor's address or whereabouts is unknown. After the bailee has acquired a lien under section 5, section 9(1) gives him a right of sale. It provides that if the goods are not taken away by the bailor pursuant to section 4 (here section 5 is obviously intended) then,

> . . . the lien holder may give notice to the debtor by registered post or personal service, specifying a reasonable time and place for payment, the amount owing and the property detained, and stating that in default of payment an application will be made to a judge at a time and place to be mentioned therein for leave to sell such goods.

If, however, the lien was acquired because notice was dispensed with under section 5(2) owing to the bailor's absence, it will also be necessary to dispense with the notice in section 9(1). Unfortunately there is no express provision in the Act to enable a judge to dispense with the notice required by section 9(1). Therefore, it would appear that the bailee, although endowed with a statutory lien under section 5, only has a passive right of retention if the bailor cannot be found.

It might be argued that a judge on hearing an application for leave to sell the goods pursuant to section 9 has the implied power under section 9(3) to dispense with the notice required by section 9(1). Section 9(3) reads as follows:

> On the hearing of the application the judge may make such order as he deems just.

It is submitted, however, that notice is a condition precedent to the use of section 9(3).

Another answer to the problem might be found in section 23 of the Interpretation Act,[6] which provides that where an enactment authorizes or requires a document to be served or delivered by post, then, unless the contrary is proved, service or delivery is deemed to have been afforded at the time at which the letter would be delivered in the ordinary course of post. But section 23

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6. R.S.N.B., 1952, c. 114.

of the Interpretation Act speaks of "properly addressing" such letters. It is submitted that these words presuppose a definite knowledge of the person's whereabouts and so render the section useless in interpreting section 9(1) of the Liens on Goods and Chattels Act.

It may also be argued that the notice required by section 9(1) of the Liens on Goods and Chattels Act may be served under Order 67, rule 6 of the Rules of the Supreme Court. That rule reads as follows:

> 6. Where personal service of any writ, notice, pleading, summons, order, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge that prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just.

It is submitted, however, that if the notice required by section 9(1) could be deemed to be served under this rule, then the power to dispense with the notice required by section 5 of the Act would be superfluous. Since the Legislature should not be deemed to intend a superfluity, it would appear that there has been an intentional omission to enact an express power enabling a judge to dispense with the notice required by section 9(1)—*expressio unius, exclusio alterius.*

If, as has been suggested in the foregoing, section 9 of the Liens on Goods and Chattels Act does not provide a comprehensive power of sale for a bailee where the bailor cannot be found, then conceivably the bailee might rely on Order 50, rule 2 of the Rules of the Supreme Court to dispose of the goods. That rule reads as follows:

> The Court or a Judge, upon the application of any party, may make an order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or Judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature, or likely to injure for keeping, which for any other just and sufficient reason it may be desirable to have sold at once.

The cases on the rule are few; it has been used primarily for the sale of perishable goods.[7] When it has been invoked to order the sale of non-perishable goods, the courts have held that they are empowered to order a sale irrespective of the rights of the parties,[8] but it has been noted that "The rule ought to be construed with a very tender regard to the persons in whom the legal property

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7. Note that the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131 s. 8(2) also provides for the sale of perishable goods.

8. *Larner v. Fawcett* [1950] 2 All E.R. 727.

is vested."[9] The rule's most common use occurs in actions where neither party's interest would be adversely affected by the disposition of the goods concerned. For example, in *Bartholomew v. Freeman*,[10] the subject matter was a horse of no exceptional value that neither party wanted and whose upkeep was costly to the person seeking the order for sale. In this case, Grove, J. said:

> The case comes sufficiently within the final clause of Order LII., Rule 2. There seems "just and sufficient reason" why it may be desirable to have the animal sold at once. I certainly should not make such an order if the horse were a valuable one for which either party particularly cared. But here neither of them values it per se nor wishes to keep it.[11]

And Singleton, L. J., in *Larner v. Fawcett*,[12] said:

> . . . but, in view of (the owner's) obvious reluctance to take any step to recover the filly, I think it would be deplorable if this court . . . having the power, . . . did not exercise it.

Evans v. Davies,[13] where an order was made for the sale of shares in a limited company, indicates that the rule can be invoked for the sale of any type of chattel, provided, of course, that the circumstances of the application are sufficient to satisfy the rule.

The Annual Practice[14] cites *Dawn v. Herring*,[15] as authority for the statement that an application under Order 50, rule 2, should not be made *ex parte*. A review of several reports of that case has revealed no basis for the statement in The Annual Practice, but whether or not the statement is authoritative, it should be noted that it is merely directive, not mandatory. If it is found, however, that an application under Order 50, rule 2, cannot be made *ex parte*, then if the address or whereabouts of the bailor is unknown, a solution in accordance with *The Hercules*[16] might be available. In that case there was a motion by the plaintiff for the appraisement and sale of a vessel. The plaintiffs had begun an action *in rem* against The Hercules for damage by collision, but no appearance was made. Butt, J. said:

> I cannot grant an application to sell a foreign ship on such materials as are at present before me. But I will make the required order, subject to the plaintiff's filing an affidavit in the registry verifying their cause of action, and stating also

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9. *Dangar v. Gospel Oak Iron Co.* (1890) 6 T.R. 260, Per Denman, J. at p. 261.
10. (1878) L.R. 3 C.P. 316.
11. *Ibid.*, at p. 318.
12. [1950] 2 All E.R. 727, at p. 732.
13. [1893] 2 Ch. 216.
14. 1953 edition, at p. 877.
15. (1891) 35 S.J. 752.
16. (1886) L.R. 11 P.D. 10.

> that an appearance has not been entered on behalf of the ship.[17]

On the basis of *The Hercules* it would appear that the most certain procedure to effect a sale is to begin an action for the charges arising under section 5 of the Liens on Goods and Chattels Act,[18] and, where the address or whereabouts of the bailor is unknown, apply for an order to give notice of the writ by advertisement under Order 9, rule 2(4). Having obtained such order and having advertised in the prescribed manner, the bailee would, then, if an appearance were not made, be in a position to apply to the court pursuant to Order 50, rule 2, and if he supported his application with proper affidivits, an order for sale could be obtained.

As can be seen from the foregoing, the law regarding the power of sale of gratuitous bailees and other bailees given a lien under the Liens on Goods and Chattels Act is defective. A more serious defect, however, exists in the law regarding most bailees for hire. At common law even where money was owing a bailee in respect of the bailed goods, he had no right of sale. In certain situations, the law allowed a bailee a lien, the most common being the innkeepers' lien,[19] the common carriers' lien[20] and the lien of a person who has done work on an article.[21] But as Grose, J. explains in *Hammonds v. Barclay*[22] a lien is merely

> . . . a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied.

It confers no right of action;[23] it is mere passive right of detention until the debt is paid, and so no claim can be made for storage or keep[24] unless, of course, there is a contract to the contrary. Although it was argued in *The Thomas Iron Works Company v. The Patent Derrick Company*[25] that such a right of retainer without a power of sale seems of little utility and renders the goods subject to the lien utterly useless to both parties, that is the common law and, except in cases of necessity, one has to rely on statutory provisions to obtain a power of sale.

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17. *Ibid.*, at p. 11.
18. R.S.N.B., 1952, c. 131.
19. *Thompson v. Lacy* (1820) 3 B. & Ald. 283; 106 E.R. 667; now codified by the Inn-Keepers Act, R.S.N.B., 1952, c. 111, s. 2.
20. *Rushforth v. Hadfield* (1805), 6 East 519; 102 E.R. 1386.
21. See, for example, *Keene v. Thomas* [1905] 1 K.B. 136; now codified by the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131, s. 2.
22. (1802) 2 East 227, at p. 235; 102 E.R. 356, at 359.
23. *Higgins v. Scott* (1831), 2 B. & Ad. 413; 109 E.R. 1196.
24. *Spears v. Hartly* (1880) 3 Esp. 81; 170 E.R. 545.
25. (1860) 1 J. & H. 93; 70 E.R. 676.

No general provision appears in the Liens on Goods and Chattels Act or elsewhere for granting a lien to bailees for hire, let alone a power of sale. This is strange indeed since in the Liens on Goods and Chattels Act in the Revised Statutes of 1927, it was provided that

> A bailee for hire shall have a particular lien on the goods bailed to him by the owner for any charges which may be due the bailee under the bailment.[26]

Since there appears to be a higher duty imposed on a bailee for hire than on a gratuitous bailee,[27] the former would seem to be entitled to a lien more than a gratuitous bailee. Perhaps in preparing the 1952 statute[28] the draftsman felt that a bailee for hire was entitled to a lien at common law, and, consequently that the section in the 1927 Act just quoted was unnecessary. This is, however, not the law. In the absence of statute[29] no lien can be exercised in respect of things delivered but on which no work is done.[30]

It is suggested that the Liens on Goods and Chattels Act should be amended to give a comprehensive power of sale to bailees, whether gratuitous or for hire, and whether or not the bailee can be located.

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26. R.S.N.B., 1927, c. 164, s. 4 (1).
27. See *Giblin v. McMullen* (1869) L.R. 2 P.C. 317; *Cf. Wilson v. Brett* (1843) 11 M. & W. 113; 152 E.R. 737, per Rolfe, B.
28. R.S.N.B., 1952, c. 131.
29. Such as, for example, the exceptions already mentioned appearing in the Liens on Goods and Chattels Act, R.S.N.B., 1952, c. 131 and the Warehouseman's Lien Act, R.S.N.B., 1952, c. 247. The latter statute may at first sight look fairly broad but it should be noted that by s. 1 (b) its application is limited to persons engaged in the business of storage.
30. See *Hatton v. Car Maintenance Co., Ltd.* [1915] 1 Ch. 621.