BAILMENT AND THE DEPOSIT FOR SAFE-KEEPING

I

"Bailment, from the French *bailler*, to deliver," says Blackstone,[1] "is a delivery of goods in trust, upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee." The emphasis on contract, it is true, is the subject of dispute. "The essence of bailment," Mr. T. Cyprian Williams writes,[2] "is not the contract which accompanies it, but it is the delivery of the goods upon a condition agreed for as to their re-delivery; in other words, the transaction is essentially one of conveyance, not of contract." On both views, there is no bailment unless there is a passing of possession. As Winfield puts it:[3]

> The salient feature of bailment is ... the element of possession. Bailment is not only one of the modes of transferring possession, but while the bailment lasts it connotes possession. As between bailor and bailee that was recognised very early in our law.

In the theoretical writings on bailment, the importance of the passing of possession has been somewhat neglected. The existence of a bailment is often not at issue in court; the extent of the bailee's liability almost always is. Attention has thus been focused on the contractual aspects and implications of bailment; much ingenuity has gone into distinguishing various types of bailment and the liabilities appropriate to each.[4] Some

1. 2 *Bl. Comm.* (13th ed., 1800), at p. 451.

2. "The Nature of the Pawnee's Interest in Goods Pawned", (1915) 31 L.Q.R. 75 at p. 80.

3. *The Province of the Law of Tort,* (Cambridge, 1931), at pp. 101 - 2. *Cf.* Thomas Atkin Street, *Foundations of Legal Liability,* (New York, 1906), vol. 2, at p.252; O. W. Holmes, *The Common Law,* (Boston, 1948), at p. 172; Pollock and Wright, *Possession in the Common Law,* (Oxford, 1888), at p. 163; George Whitecross Paton, *Bailment in the Common Law,* (London, 1952), at p. 30; D. R. Harris, writing the chapter on Bailment, in *Chitty On Contracts,* (22nd ed., 1961), vol. 2, at p. 72. The way in which an emphasis on contract (especially evident in some of the cases) has been allowed to overlay and confuse the issue of possession and its passing is discussed by William King Laidlaw, "Principles of Bailment", (1930) 16 Cornell L.Q. 286.

4. See, *e.g.,* such well-known monographs as Jones, *An Essay on the Law of Bailments,* (London, 1833) ; Story, *The Law of Bailments,* (Boston, 1843) ; Paton, *Bailment in the Common Law,* (London, 1952) and Holt C.J.'s classification into six sorts of bailments: *depositum, commodatum, locatio et conductio, vadium*, bailment for carriage or work to be done with reward, and bailment for carriage or work to be done without reward, in *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909.

   The early law relating to bailment, re-affirmed in *Southcote's Case* (1601) 4 Co. Rep. 83b, imposed strict liability for all losses while the thing bailed is in the hands of the bailee: "To be kept and to be kept safely is all one". *Southcote's Case,* however, did allow a bailee to escape some liability if he specifically undertook merely to keep as his own goods, in which case the bailee

of this ingenuity, at least, has been exercised at the expense of a careful consideration of the nature of bailment in general and at the cost of over-emphasising its contractual aspects. The treatment of the finder as a bailee for the true owner and the growing acceptance of involuntary bailments are left hanging as curious anomalies, smelling of 'fiction'.

The existence of a bailment, however, can and does become an issue in court. The law has long held that when a master passes a chattel to his servant to deal with in the course of the servant's employment he does not pass possession of the chattel to the servant; he creates no bailment but only a 'custody' or charge. The law has also long held that the innkeeper who 'serves a man with a piece' [5] does not pass possession to him but gives him mere authority or licence to use. The distinction between giving a chattel into a person's custody or charge (or giving that person a 'licence to use' the chattel) and bailing that chattel to him cannot be established by merely inspecting the act of delivery as such — the chattel may pass from hand to hand in much the same way in each case. Neither does the law of bailment provide us with a formalistic criterion for resolving the problem, with a rule such as 'there shall be no bailment unless the bailor states that he is handing into the possession of the bailee.' [6]

In *R.* v. *Smith*[7] the prisoner, having led the prosecutor to believe that he was about to pay him a certain sum due to him from a third person, took out of his pocket a piece of paper with a sixpenny stamp affixed. When the prosecutor had written upon this paper a receipt for the sum owing, the prisoner took up the receipt and left the prosecutor without paying him. He was indicted for larceny of the stamped receipt and convicted, but on a case stated for the opinion of the Judges, there was unanimous opinion that the conviction should be quashed. As Parke, B., said:

> The stamped paper never was in the prosecutor's possession, and the prisoner cannot be convicted of stealing it unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over

was not liable for theft. The distinction in kinds of bailment and undertaking was therefore an attempt, made right from the start but not generally successful until *Coggs* v. *Bernard*, *supra,* to mitigate the harshness of the general principle of strict liability on special grounds. Until the end of the 19th century, both lawyers and writers were satisfied to plead a specific type of bailment to avoid full responsibility; but from that time onwards, writers sought to generalise liability on a bailment by placing the issue on the nature of the undertaking. See *e.g.,* Joseph H. Beale, "Gratuitous Undertakings", (1891) 5 Harv. L.R. 233 and "The Carrier's Liability", (1897) 31 Harv. L.R. 158; William King Laidlaw, *op. cit.,* and Charles E. Cullen, "The Definition of a Bailment", (1926) 11 St. Louis L.R. 258.

5. (1447) Y.B. 49 Hen. 4, Mich., pl. 9. The same view had been taken in (1353) 27 Lib. Ass. 39 (transl. by C. S. Kenny, *Select Cases on Criminal Law,* (7th ed., 1928), at p. 219.

6. The rules relating to the transfer of things (*res mancipi*) in Roman Law and the requirement of *sala* and *gewerida* in early Germanic law did create such formalistic criteria, which have survived in Common Law conveyance of title to land; they no longer apply to the passing of possession of land or chattels.

7. (1852) 2 Den. 449.

> to him to write upon it... there was never any property in the stamped paper in the prosecutor. It was never delivered to him to keep.[8]

In an earlier, substantially similar case relied upon by Parke, B., the case of *R.* v. *Hart*,[9] Littledale, J., had made the same point in greater detail:

> If a person by false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and [the prosecutor] never had them except for the purpose of writing on them; they were never out of the prisoner's sight; [the prosecutor] writes on them as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all.[10]

Still earlier in *R.* v. *Chisser*,[11] where the prisoner had come into a shop, asked to see some linen and had run away with the material after being handed it to look at, he was convicted of felony because there was no change of possession until he ran away:

> Although these goods were delivered to Chisser by the owner, yet they were not out of her possession by such delivery, till the property should be altered by the perfection of the contract, which was but inchoated and never perfected between the parties; and when Chisser run away with the goods it was as if he had taken them up, lying in the shop and run away with them.[12]

The principle on which these cases were decided was grasped and re-affirmed in *R.* v. *Thompson*,[13] where a woman wishing to buy a railway ticket had handed a sovereign to the prisoner, who was nearer in the queue, to purchase the ticket for her. The prisoner made off with the

8. *Ibid*., at pp. 451, 452 - 3.

9. (1833) 6 Car. & P. 106. The prisoner had produced from his pocket book ten blank 'stamps' and the prosecutor had written on each of them the words "Payable at Messrs. Praed & Co., 189, Fleet Street, London." The prisoner took them away, but several days later met the prosecutor and told him he had forgotten to sign them. The prisoner once more produced the papers, the prosecutor signed and wrote the word "Accepted", on each and gave them back to the prisoner, who in turn promised to mail the money in a few days but failed to do so. He was indicted for larceny of the notes; the question whether the imperfect bills of exchange handed to him the first time could be the subject of larceny was one other important issue at the trial.

10. *Ibid*., at pp. 118 - 9. The same conclusion was reached, on grounds not so well stated, in *R. v. Phipoe* (1785) 2 Leach 673, and *R. v. Frampton* (1846) 2 Car. & K. 47, where the Court said: "the receipt stamp was given by the creditor to the debtor for a special purpose, namely to prepare the receipt; and it never was in the prosecutor's possession after the receipt was in a completed state". In *R.* v. *Rodway* (1841) 9 Car. & P. 784, where a landlord had given a completed receipt to a tenant believing that a certain sum was to be paid and the tenant paid only part of the; sum but refused to return the receipt, it was held to be larceny: the case is to be distinguished on the ground that the receipt *had* been in the possession of the landlord.

11. (1678) T. Raym. 275, 3 Salk. 194 (cited in *R.* v. *Summers).*

12. *Ibid*., at p. 276 (T. Raym.).

13. (1862) Le. & Ca. 225.

money and was subsequently indicted for larceny. Affirming his conviction in the lower court, Wightman, J., said:

> The true doctrine is that, if the owner delivers a chattel to another for a temporary purpose, and himself continues present the whole time, that other has only the custody of the chattel, and not the possession of it, and, if he converts it to his own use, may be convicted of larceny at common law.[14]

One of Wightman, J.'s brother judges, Williams, J., agreeing that there was larceny because the prisoner had only a custody, treated Wightman, J.'s principle somewhat more broadly:

> I do not, however, think that, under the circumstances of this case, the actual presence of the prosecutrix during the whole time was necessary. I am of opinion that it would have made no difference in this case if she had withdrawn for a short time.[15]

This opinion, we have seen, was shared by the editor of the report of *R.* v. *Sharpless and Greatrix*; it was stretched to the maximum, perhaps, in *R.* v. *Aickles*.[16] The owner of a bill of exchange had passed to the prisoner the bill, originally for the purpose of having him ascertain that it was good, but then allowed the prisoner to leave with it in order to have it discounted. Distrusting the prisoner, however, the owner instructed his clerk to follow the prisoner to the place of payment and not to let him out of sight until the money had been received and paid to the clerk. The Court held that the delivery of the bill to the prisoner had not passed possession of it to him.

In the cases we have been citing, then, the physical passing of a chattel from one hand to another has been held not to constitute a passing

14. *Ibid*., at p. 230. Although the final phrase may suggest that Wightman J. is laying down a principle of the law of larceny, it should be noted that here, as in the preceding criminal cases cited, the principle being laid down is a general principle of possession in no way affected by its criminal context. The submission by counsel for the prisoner, that the only possible case against his client would have to rest on the allegation of larceny by a trick or obtaining by false pretence, while striving to bring the issue down to specifically criminal principles, was significantly rejected by the Court. In another case, *R.* v. *Sharpless and Greatrix* (1772) 1 Leach 92, the Court dealt with the matter in specifically criminal terms. S., acting in concert with G. and according to a plan, got a tradesman to bring to his house various goods to look at; S. separated a number of these and asked to be brought more; the tradesman thereupon left to fetch more and S. and G, decamped with the goods. The prisoners were indicted before Gould J. for larceny and convicted; the conviction was upheld by the Judges to whom the case was referred on the ground that "the whole of the prisoners' conduct manifested an original and preconcerted design to obtain a tortious possession of the property" *(i.e.,* that it constituted what was soon to be called 'larceny by a trick'). But, subsequently, the editor of the report added this note: "The verdict of the jury imports, that in their belief the evil intention preceded the leaving of the goods; but, independent of their verdict, there does not appear a sufficient delivery to change the possesion of the property" *(Ibid*., at p. 93; 2 East P.C. 675, discussed *infra,* makes the same point). Here is a timely reminder, in a comparatively adverse context, that the study of possession cannot proceed by sharply distinguishing civil from criminal cases.

15. *Ibid*., at p. 230.

16. (1784) 2 East P.C. 675-7.

of possession, but to create a charge or licence to use.[17] In most of the cases the Court placed considerable emphasis on the fact that the chattel in question had not left the presence or sight of the deliverer; to this extent the courts were clearly applying the general criteria of control that I have elsewhere argued to be the basis of possession.[18] However, a great deal of weight was also placed — particularly in *R.* v. *Aickles* — on the *purpose* of the delivery, on the fact that the transaction did not require the passing of possession to the recipient and that therefore, in the circumstances, there was no reason for supposing that possession did pass.

Professor John Scurlock,[19] relying on the view that bailment is a delivery *on trust,* has sought a more fundamental rationale of the cases so far discussed by arguing that both the deliverer's continued supervision and the purpose of the delivery are to be treated not as direct evidence of possession and control but as evidence of the absence of trust.

> Where the thing was delivered for a special purpose and was intended to remain in the owner's presence, it would not be said that he had reposed any confidence in the party in whose hands it was placed. Since the owner could reclaim the goods at any time, his dominion over them was nearly the same as before. It was not like a delivery on bailment: the contract of bailment gave an interest to the bailee beyond custody.[20]

The first sentence, no doubt, presents Professor Scurlock's point more successfully than the material which follows, in which the distinction between bailment and a licence to use is not brought out clearly or accurately enough. The bailor-at-will, after all, can also reclaim the goods at any time and the man looking at materials in a shop in order 'to cheapen' them has an interest beyond that of custody. But certainly the absence of any trust, the continued supervision of the goods by the 'deliverer' or his agent and the fact that the purpose of the delivery would not require the deliveree to have possession, do all constitute evidence against the passing of possession and the creation of a bailment. Professor Scurlock, relying on a contractual view of bailment, singles out lack of trust as the fundamental ground and treats the remaining grounds as evidence of such lack of trust. If we reject, for wider reasons this view of bailment as requiring a delivery upon contract or trust, we can put the matter in a different way that is equally faithful to the decisions and the reasoning enshrined in the cases. We can single out as the fundamental ground for denying that possession has passed the deliverer's continued control and supervision and regard the purpose of the delivery and the absence of trust as corroborative evidence that the deliverer has not relinquished control. Treated in this

17. It is precisely this fact, *i.e.* that possession does not pass because of the continued control or supervision of the licensor, that distinguishes the licence to use (which is not a bailment) from the *commodatum* (which is).

18. See A. E. S. Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach", to appear in the University of Melbourne Law Review for November, 1964.

19. Scurlock, "The Element of Trespass in Larceny at Common Law", (1948) 22 Temple L.Q. 12.

20. *Ibid.*, at p. 18.

way, the cases we have been discussing once again focus attention on control as the content of 'possession'.

It is true, however, that the purpose of the delivery, the accompanying distrust or the failure to consummate a formal passing of possession by sale might be interpreted as having importance not so much as evidence of continued control, but rather as evidence that the deliveror did not *intend* to pass possession. The relative importance of *animus* and *corpus* in the determination of possession has been the subject of much debate. In general terms, there is no doubt that the mere intention to control, unaccompanied by any present and manifest power of control, is not sufficient to establish possession.[21] *It may, however, for a period continue it.* Thus the intention to control acquires special importance where the facts of control are ambiguous and in dispute and where one claimant has to rely on a non-consensual acquisition of possession. From the real property doctrine of 'continual claim'[22] onward, the law — in the interests of maintaining order and discouraging violence and wrong — has been slow to recognise the non-consensual passing of possession. For the limited period that the facts of control remain ambiguous, the law will recognise the rightful possessor's continued intention to control us successfully making up for any temporary absence of, or deficiency in, actual, exclusive control.[23] The possession of the thief who has successfully carried away the loot is beyond question; the fact that I do not pass possession merely by handing my ring to a jeweller to value while I wait in his shop or by lending my guest a racquet with which to play tennis on my court is also beyond question. It is in cases where neither party has exclusive or manifest control, as in *R.* v. *Aickles*, that the rightful possessor's continued intention to control (indicated in this case by sending the servant to watch) is of crucial importance. Even if the court cannot go solely upon my uncorroborated account of my intention, it will not presume intention beyond that reasonable in the entire circumstances of the physical delivery.[24] If I hand my guest a book to examine, if I give my servant my shirt to wash, the circumstances suggest that I am giving no more than a licence to use in the first place and no more than a charge in the second. It is not impossible for me to bail something to my guest or my servant in similar circumstances, but very clear evidence will be required to show that I have manifested my intention in such a way as to make them bailees.

21. Thus Holmes' powerful ruffian moving in to wrest a pocket-book from a child has not possession of it till the actual wresting has taken place: Holmes, *op. cit.*, at p. 235.

22. Littleton, *Tenures,* ss. 414-5; *Coke On Littleton,* 250. a, b, 251. a.

23. This is clearly the view taken by the editor of the report of *R.* v. *Sharpless and Greatrix*, *supra,* and East J., in allowing the possession of a tradesman, who has left goods at a house while returning to his shop to fetch more, to continue.

24. As Pollock puts in: "It must then depend on the true intent of the transaction, as ascertained from all the circumstances, whether there is a bailment or a mere authority or licence to deal with the thing in a certain way": Pollock and Wright, *op. cit.*, at p. 58.

II

The deposit for safe-keeping normally confronts the law with a situation that seems at first sight particularly favourable for applying the traditional contractual concept of bailment. There is, generally, a contract or agreement, an actual and intentional handing over of the goods to be kept and managed by another and an agreement for the redelivery of these goods at a certain time. In such widespread arrangements as the storage of goods with a warehouseman or the leaving of a car at a garage for repairs there is normally no doubt of the existence of a bailment. The warehouseman or the garage proprietor has the right to exercise such power and control over the chattels left as he regards suitable or deems necessary for his own convenience and the protection of his own interests provided he acts within the terms of his contract; [25] he will stack or place the goods where and how he wishes, make his own arrangements for their protection and remove them from one place to another according to his convenience. His control is limited only by the depositor's title, the general provisions that may be implied by the nature of the bailment and the specific provisions of the contract or agreement accompanying the particular bailment. In *Ashby* v. *Tolhurst*[26] the owner of a motor-car had left it at a car-park, paid l/- for a ticket for being able to do so and had received a printed ticket stating that all cars were left in all respects at the owners' risks. The plaintiff's car was taken from the park by a thief who had neither ticket nor key. On an action for damages for negligence (in which negligence was admitted but liability denied) the Court of Appeal held that there was no contract for safe-keeping and that the relationship between the proprietors of the car-park and the owner of the vehicle was that of licensors and licensee; that there was therefore no liability at all on the part of the proprietors; that what was done by the attendant (who had allowed the car to pass out of the park) did not amount to misdelivery; that the conditions on the ticket completely relieved the proprietors of liability even if there had been both bailment and negligence; and, finally, that no term could be implied in the contract, if any, that no car should be allowed to pass without a ticket having been presented. Part of the Court's reason for holding that there was no contract for safe-keeping was that the facts did not lead one to suppose that the car had been placed in the possession of the proprietors: "parking your car means, I should have thought, leaving your car in the place [described as a car-park].... and nothing else." [27]

25. The terms of the contract, of course, may severely limit the bailee's freedom of action without destroying the bailment as long as he is left a genuine area of control in his own interest from which he can exclude even the bailor until the bailment has been determined. Restrictions on his freedom of action that do not destroy such area may limit his liability under the bailment. Thus in *Harper* v. *Jones* (1879) 4 V.L.R. (L.) 536, where the depositor insisted that the warehouseman stack the depositor's rice on the floor and not on the platform, the Court upheld the existence of a bailment but relieved the bailee of liability for damage caused by an unusual flood which reached the rice on the floor but did not reach the platform.

26. [1937] 2 K.B. 242 (C.A.), [1937] 2 All E.R. 837 (a less detailed report); noted in (1937) 53 L.Q.R. 301 by P.H.W.

27. *Per* Sir Wilfred Greene M.R., at p. 249.

The Court thus focused some attention on the question of possession, even if it did not regard this question as having any more than subsidiary importance in this case.[28] "In order that there shall be a bailment," Romer, L.J. said, "there must be a delivery by the bailor, that is to say, he must part with the possession of the chattel in question."[29] The essence of delivery was thus taken non-technically as lying in parting with possession to another rather than in the accompanying intention or agreement.[30] The Court did not go on to consider the criteria for deciding whether the plaintiff had parted with possession of the car systematically, but it did appear to be conscious of the facts bearing on the question of control. The ground on which the car was parked belonged to the defendants, but it was perfectly bare and open on two sides. There was no evidence that the defendants sought to exercise any control over persons entering or leaving the ground or that they proffered supervision as an inducement for parking at a fee. The Court was prepared to hold from the facts that no term could be implied into the contract to the effect that a car should not be handed over without production of the ticket: it accepted that the attendant was not there to guard the cars or to take them into his safe-keeping, or even to supervise the piece of land generally, but that he was there only to prevent people from parking their cars on this private land without paying the fee. It is on this basis that Sir Wilfred Greene could say:

> It would be rather a surprising result if, when a man left his car on land like this and paid 1/- for the privilege of doing so, possession passed in a way in which it certainly would not pass if he left it in a public park in a square in London and paid the attendant 6d for the ticket. ...It is not like articles in a railway cloakroom which have to be handed out by the cloakroom attendant before the person claiming them can get them. This is a case where anyone can walk on to the land and get into a car... .[31]

28. See *ibid*., at pp. 248-9.

29. *Ibid*., at pp. 254 - 5.

30. *Cf. Theobald* v. *Satterthwaite* 190 P. 2d 714, 1 A.L.R. 2d 799 (1948), where the Court said: "While we are not inclined to view the element of delivery in any technical sense, still we think there can be no delivery unless there is a change of possession of an article from one person to another" (*per* Mallery C.J., 190 P. 2d at p. 715).

31. [1937] 2 K.B. 242 at pp. 250, 251. In a substantially similar case, *Ex p. Mobile Light & Ry. Co.* 101 So. 177, 34 A.L.R. 921, 131 A.L.R. 1180 (1924), an American court said: "A fee charged for a parking privilege in the place may be regarded as carrying the right to parking space with rights of ingress and egress. We find nothing in the complaint indicating that possession and control, actual or constructive, was surrendered to or assumed by the defendant. The complaint defines the duty of the gatekeeper to be at the entrance to collect the fee or charge for parking. He is alleged to have remained there a portion of the time, — the time for collecting entrance fees, — but not, so far as appears, when the cars were removed. He had a duty to see that a car go in only on payment of the charge, but no duty to see when or by whom the car was taken out. There was another employee 'whose duty it was to generally watch after said automobiles so parked.' This duty is consistent with either a bailment or a general oversight of the car while parked on the space leased by the owner and still under his control" (101 So. at p. 178). The second employee with his ambiguous duty was not present in *Ashby* v. *Tolhurst*, *supra;* in the American case it was held that the ambiguity must be construed against the pleader as not implying bailment.

The reluctance to see any passing of possession here would be somewhat reinforced by consideration of the special nature of motor cars and the normal modes of possessing them. A motor car, by its nature, cannot be kept constantly under the eyes or in the physical grasp of its possessor; he parks it before his office, in the street before his house, on vacant land near the beach. While he leaves it, his intention to retain control (possibly but not necessarily reinforced by locking his car[32]) is sufficient to bridge the gap in actual, physical control, if no one else succeeds in assuming exclusive control over it. In *Ashby* v. *Tolhurst*, *supra,* the evidence strongly suggested that no one else (before the thief's departure with the car) had assumed such control;[33] it is for this reason that the Court could convincingly hold that there was no delivery to the attendant.[34]

In *Tinsley* v. *Dudley*[35] — where the plaintiff brought an action for damages against the keeper of a public-house after the motor-cycle he had parked in a closed yard adjoining the public-house had been stolen — Sir Raymond Evershed, M.R., immediately brought the issue to the question whether the public-house keeper had possession.[36] The Master of the Rolls rejected the view taken by the learned judge in the lower court that if the plaintiff was an invitee and not a licensee then possession passed to the invitor — the distinction between invitees and licensees, he held, has reference only in actions for personal injuries and incidental damage to property and has no bearing on the issues of bailment.[37] Instead, dismissing any legal signification following from

32. In *Ashby* v. *Tolhurst*, *supra,* the plaintiff had in fact locked his car.

33. Here, as in the cases cited in the preceding section, the *purpose* of the transaction may also help to resolve doubt. Thus Romer L.J., said: "It is true that, if the car had been left there for any particular purpose that required that the defendants should have possession of the car a delivery would rightly be inferred. If, for instance, the car had been left at the car park for the purpose of being sold or by way of pledge or for the purposes of being driven to some other place or indeed for the purposes of safe custody, the delivery of the car, although not actually made, would be readily inferred. But it is perfectly plain in this case that the car was not delivered to the defendants for safe custody. .. .It is also plain that the car was not left there for any other purpose" (at pp. 255, 256).

34. We have discussed *Ashby* v. *Tolhurst* at this length because of the remarkably misleading treatment it is given in the text-books. Thus in *Winfield On Tort* (6th ed., 1954, by T. Ellis Lewis), in this respect representative, it is presented as a case of no conversion because (1) merely to allow a stranger to take away the car is mere omission and not sufficient for conversion (p. 418) and (2) in doing so, the defendants were not denying the title of the plaintiff or asserting a right inconsistent with it (p. 426). But these propositions are very much *obiter dicta;* the crux of the case lay in two other propositions: (1) the point, which we have discussed at length, that there was no bailment on which to found liability (2) that even if there had been bailment, there was no contractual term requiring the defendants to surrender only against a ticket and there was a contractual term exempting them from liability for all such negligence.

35. [1951] 1 All E.R. 252 (C.A.).

36. "The decision must depend on discovering in whose hands was the custody [*i.e.*, possession] of the article in question" (*ibid*., at p. 255).

37. *Ibid*., at pp. 255 - 6. This important point, that liabilities *vis-a-vis* licensees upon premises have no connexion with liabilities under bailment, must not be forgotten; neither must the licence to enter premises be confused with the licence to use.

the fact that the yard was described in a notice as a "covered yard and garage", the Master of the Rolls held that the facts indicated it to be a car-park to which the decision in *Ashby* v. *Tolhurst*, *supra*, applied:

> If, therefore, on the true view of the facts in the case now before us, this yard ... was really no more than a car park, the case is governed by *Ashby* v. *Tolhurst.* On the other hand, it is conceded, if I take my motor car to a garage, in the ordinary acceptation of that term, and leave it in the garage, *prima facie* there would be a delivery over of possession or custody to the garage proprietor. . . . .[38]

The distinction between a car-park and a garage is to be made, as we have suggested, in terms of general criteria of possession and control, especially in terms of the absence or presence of the proprietor's ability to control the car by exercising physical power over it in his own interest and according to his own convenience, which implies his power to exclude others, including even the depositor, as long as he has this control. The importance of this latter test was recognised by the Court in *Halbauer* v. *Brighton Corporation.*[39] The Corporation during the summer months allowed campers to park their caravans on its caravan site, charging them 25/- a week for use of the site and its facilities. Each camper remained in control of his own caravan and vehicles and visitors passed in and out of the gates day and night without let or hindrance. During the winter months the camp was closed and the road gates were locked, all caravans left by customers were kept on a hard tarmac; no one, including such customers, was permitted to enter the camp, and a 'storage charge' of 12/6 a week was levied in respect of these caravans. The Court held that there was bailment to the Corporation in the winter but not in the summer. In winter the Corporation had the liability of a bailee safe-keeping for reward, having to exercise the care of an ordinarily prudent man in safeguarding the caravans; in summer, when the users of the site would be mere licensees toward whom the Corporation assumed no duty to safeguard property, the Corporation would have no liability for theft, loss or damage save in so far as these resulted from "negligence within its sphere of operations." The Court therefore held that the plaintiff could not recover for theft of a caravan stored in winter but stolen during the summer, since she was aware that the winter arrangements had come to an end and had failed to move the caravan from the hard tarmac for her own convenience.

The same criteria, with their emphasis on the bailee's assumption of control over the chattel and his power to exclude even the bailor, have been used in a long line of U.S. decisions on parking.[40] The parking of a car on a parking lot, the courts have held, is based at the least on a licence to use the parking space or a rental of it, but it may be a bailment. Whether or not there is a bailment depends on whether possession and control of the car has been passed to the operator of the lot or his

38. *Ibid.*, at p. 257.

39. [1954] 2 All E.R. 707.

40. For a general discussion of the U.S. principles in this area see: 24 Am. Jur. 493, "Garages, Parking Stations and Liveries", s. 29; Blashfield, *Cyclopedia of Automobile Law,* (Minnesota, 1927), vol. 3, at pp. 2406 - 7; and Laurence M. Jones, "The Parking Lot Cases", (1938) 27 Georgetown L.J. 162.

agent and this in turn "depends on the place, the conditions, and the nature of the transaction."[41] Generally, the courts have held that where cars may be parked and removed by their owners at will there is no bailment, even if there are attendants who collect fees and exercise a general supervision over the lot and the cars within it.[42] Where the operator of the parking lot exercises and intends to exercise such control over the car that he could exclude even the owner from possession, at least until certain steps have been taken, then the courts hold that there is bailment.[43] Thus, if the driver is required to deliver the keys of the car to the operator,[44] or if he cannot take his car until he has surrendered a ticket acquired from the operator,[45] there is bailment. The assertion of a bailment in such parking cases in general, then, depends on evidence that the alleged bailee has direct control over the car, being able to deal with it in terms of his own interest or convenience *(i.e.,* not solely on behalf of the customer but also according to the general requirements of his business and his obligations to other customers), or that he has power to exclude from it all others, including even the owner, until the relationship has been terminated. Whether a fee is charged or not is in principle irrelevant to the existence of a bailment, though American courts have also used the argument in *Ashby* v. *Tolhurst* that the lowness

41. *Osborn* v. *Cline* 189 N.E. 483 at p. 484, 131 A.L.R. 1202 (1934).

42. *Porter* v. *Los Angeles Turf Club* 105 P. 2d 956 (1940); *Ex p. Mobile Light & Ry. Co.* 101 So. 177, 34 A.L.R. 921 (1924). The principle has been applied just as firmly where the parking lots are within enclosed amusement parks or fair grounds and where attendants direct the driver to a designated spot: *Suits* v. *Electric Park Amusement* 249 S.W. 656 (1923) ; *Lord* v. *Oklahoma State Fair Assoc.* 219 P. 713 (1923) ; *Panhandle South Plains Fair Assoc.* v. *Chappell* 142 S.W. 2d 934 (1940).

43. *Cf.* note in (1931) 30 Mich. L.R. 614, on *General Exchange Insurance Corp.* v. *Parking Service Grounds, Inc.* 235 N.W. 898 (1931).

44. *Beetson v. Hollywood Athletic Club* 293 P. 821 (1930); *Doherty* v. *Ernst* 187 N.E. 620 (1930); *Keenan Hotel Co.* v. *Funk* 177 N.E. 364 (1931); *Baione* v. *Heavey* 158 A. 181 (1932); *Leonard Bros.* v. *Standifer* 65 S.W. 2d 1112 (1933); *Keene v. Lumbermen's Mut. Ins. Co.* 5 S.E. 2d 379 (1939); *Kaiser* v. *Poche* 194 So. 464 (1940) ; *Sandler* v. *Commonwealth Station Co.* 30 N.E. 2d 389, 131 A.L.R. 1170 (1940); *General Exchange Ins. Corp.* v. *Parking Service Grounds, Inc., supra; Spooner* v. *Starkman* [1937] 2 D.L.R. 582 (Ont., C.A.) — a Canadian case decided on the same principle — and many others In *Fire Assoc. of Phila.* v. *Fabian* 9 N.Y.S. 2d 1018 (1938), it was the plaintiff's custom to leave his car for a fee in the parking yard behind a garage and to leave his keys in the car to enable the defendant's servants to move the car to facilitate passage for other cars. The Court held that the servants when driving the car would have bailment for the defendant, and since they had power to drive it at any time according to the convenience and needs of the business, they were generally bailees for the defendant. In principle, this ground for bailment does not strictly require access to the keys; if the depositor were required to leave his car unlocked or even locked but with the brakes off so that it could be pushed about by the servants of the business for the convenience of the business, a bailment would similarly be established. (*Cf.* the *obiter dictum* in *Porter* v. Los *Angeles Turf Club, supra:* "The mere fact that an automobile was locked and the keys retained by the owner would not necessarily preclude a finding that a . . . bailment existed.")

45. *Galowitz* v. *Magner* 203 N.Y.S. 421 (1924) ; *Hartford F. Ins. Co.* v. *Doll 5* La. App. 226 (1926). The mere existence of a ticket given after receiving a fee for parking is not enough; the question is whether it is only a receipt for the fee or also a means of controlling the redelivery of the car.

of the fee may be taken as additional evidence that the proprietor had no intention of assuming the duties and liabilities of a bailee.[46]

The difficulties arise where there is a degree of supervision over the car-park and the cars in it sufficient to enable the operator to hinder persons from approaching the cars at will, but where it is not clear that he either uses or intends to use the supervision for this purpose. The difficulties here are both those of interpreting the evidence in a given case and those of defining the necessarily fuzzy borderline of possession and control. The general principle is that the more closely the supervision approaches the point where the attendants seek to satisfy themselves that persons removing cars have the right to do so before allowing them to leave, and the drivers leave their cars in the expectation that this will be so, the more closely the situation approaches that of bailment.[47] In other words, where the circumstances attendant upon the initial leaving of the car do not indicate at all clearly whether there was delivery *(i.e.,* passing of possession) or not, then we may look to the circumstances surrounding the collection of cars to see whether the attendants behave as though they were redelivering and anxious to avoid misdelivery. Thus, there may be bailment even if the person leaving the car is not told at the time that he will be required to go through certain steps before being allowed to recover his car, but has good reason to believe that the attendants were there, in part, in order to challenge anyone who did not appear to be the depositor of the car. There may be bailment here because the operator's control over his premises and the cars within them may be such as to indicate that he has and intends to have the power to exclude anyone, even the owner, until he is satisfied that he is correctly redelivering; it is not necessary for him *specifically* to manifest this power by demanding tickets or warning drivers that they will be challenged. What kind of supervision is sufficient to suggest to the court that such control and power is present depends upon the nature and situation of the parking place; in a small parking lot with a single entrance-exit, the presence of only one attendant who appears solely to rely on his memory in allowing cars to leave does not refute the operator's assumption of such control; in a very large parking area

46. Thus in *Ex p. Mobile Light & Ry. Co., supra,* the Court said: "To write into the transaction a duty to look out for theft is to add to the special limited service the parties had in mind, and to impose a liability properly covered by the field of insurance. It would defeat the purpose to furnish a mere parking convenience for a nominal charge." Generally speaking, there has also been a marked shift in social expectations as the pressure on parking space has increased and as parking meters on public streets become increasingly common: people are now far less prone to assume that where a small charge for parking is made this also covers the duty of safeguarding the car.

47. *Galowitz* v. *Magner*, *supra*: "It seems, to me obvious that the plaintiff had the right to believe, from the fact that the defendant maintained an inclosed space for parking cars, with an entrance and exit and attendants, that he was paying the parking fee in consideration of care and watchfulness to prevent injury or loss....It is equally clear that the defendant had a like understanding of his obligation, because as he testified, he maintained this fenced parking space and three attendants 'looking after, taking care of the cars as they came in and went out' " (203 N.Y.S. at p. 423). The Court therefore held there was bailment. Our point about the change in social expectations is confirmed by the fact that this Court in 1924 thought it obvious that if the customer had not expected safeguarding he would have parked in the street and saved the fee.

with many exits and entrances the absence of any device for identification on collecting the car would go toward refuting a claim that the operator has assumed control. The main point is that the supervision must be for the purpose of preventing misdelivery — the presence of attendants who merely help to locate cars (without using this help as an unobtrusive check) and direct drivers to the exits is no more evidence of a bailment than was the presence of attendants who directed cars to available spots.[48] The difficulty for the court, of course, will often be to decide just what the attendants were doing. The accompanying difficulties of defining a bailment in this area, which we have been trying to resolve, cannot be entirely removed: the source of these difficulties, I should argue, lies in the fact that a locked car is somewhere half-way between a locked trunk, possession of which is passed on deposit in another's premises, and a locked room rented for storage, of which the renter has possession as long as he keeps the key. Although the car, like the trunk, is a chattel, like the room it normally cannot be moved.

The difficulty of defining a bailment in these conditions, however, is not always crucial in those car parking cases where a certain degree of supervision is admitted and a fee has been charged. Where the courts have accepted evidence that the car was left and the fee paid on the express or implied understanding that a watch would be maintained over the car, they have been prepared to hold the operators liable for negligence in maintaining such watch. Generally, this has been done by treating the undertaking to watch as evidence of a bailment for safekeeping, but the liability may equally be imposed without imputing bailment as following from an undertaking upon contract. In fact, since in each case the liability would normally be the same, it is not necessary for the court to decide whether there be bailment or not; whether there is bailment or not, it is to the express or implied terms of this undertaking that the court must look in deciding whether there has been negligence.[49]

48. *Panhandle South Plains Fair Assoc.* v. *Chappell, supra:* "The nearest the testimony comes to establishing this essential element [earlier defined by the Court as 'possession, control, or authority of the plaintiff's car'] is that someone who appeared to be directing the location and parking of cars generally indicated ....the direction and lane where a suitable parking space was available, and this cannot be said to constitute an acceptance of the custody of the car." (at p. 936).

49. Thus in *Pennyroyal Fair* Assoc. v. *Hite* 243 S.W. 1046 (1922), where the plaintiff parked his car on a parking lot under circumstances that would normally indicate no bailment, but where he first received an assurance that his car would be safely looked after and kept, the Court held that there was some kind of bailment but that this bailment was irrelevant to the specific liability alleged, which was under the 'special contract' established by this assurance. In *Chattanooga Interstate Fair* Assoc. v. *Benton* 5 Tenn. App. 480 (1927), the Court of Appeal refused, on similar facts, to upset the lower's court's direction that there was bailment for mutual benefit. The plaintiff-respondent had been told by a gatekeeper "Your car will be safe here" and by an attendant before the parking "We are responsible for your car", and this in fact was the sole ground for finding bailment. It should be noted that the statement "Your car will be safe here" could, in principle at law, be treated as an ill-considered statement of opinion which the person parking the car had, on the basis of his own observation, no business to rely upon; but "We are responsible", uttered in conjunction with the taking of a fee for leaving a car, is what J.L. Austin called a performatory utterance — to say that you are responsible, in these circumstances, is to make yourself responsible. What is not clear is that these words are

What is negligence and what is reasonable care will depend on the undertaking and the surrounding circumstances in each case: in the absence of specific definition of the kind or degree of care to be exercised, what will constitute negligence in a highly organised parking station normally known to demand identification from owners will not necessarily constitute negligence in a temporary parking lot operated on a roped-off piece of land. While such known conditions may impose added liabilities on the operator, they may on the other hand help to relieve him of liability. Thus in *Fire Assoc. of Phila*, v. *Fabian*, discussed in footnote 44, where the Court held that there was bailment of the car left in the parking lot at the back of garage and gasoline station, it held that there was no liability for theft because the plaintiff knew that the garage was too busy to supervise the lot effectively and therefore had acquiesced in the limited supervision of it.[50]

III

The issues relating to possession and control are just as fundamental in a long line of American decisions concerning valuables placed in safety-deposit boxes in banks and similar institutions. Here the conditions and possibilities of control by either party are normally rigidly determined by terms of the agreement and the physical circumstances under which it has to be carried out. The question before the court thus is normally not the factual problem of determining what powers are being exercised by whom, but the problem of deciding whether the powers clearly indicated by the facts amount to possession or not.

In the car-park cases, we have seen the courts having to decide between the two possibilities of bailment on the one hand and rental of space or licence to enter and park on the other. In the deposit of valuables for safe-keeping we are confronted with the same twin possibilities: is it bailment or is it rental of space? That the drawing of this distinction is to be done in terms of the criteria of possession that we have striven to bring out above, is confirmed by the words of the Court in *Zweere* v. *Thibault*,[51] where Sherburne, J., is concerned to bring out the paradigm case on each side:

> sufficient to imply acceptance of possession of the car; in both the cases cited here the existence of a bailment is at least questionable while contractual liability seems clear.

50. The courts have shown little reluctance to derive acquiescence in limited supervision from what a reasonable man would have known and observed, but they have shown reluctance to allow parking lot operators to escape liabilities by printing waivers on tickets given to customers which they would not normally read. The trend has been tc resist the view that the customer has waived his rights unless there is evidence that he has read the ticket or had its provisions drawn to his attention and was not allowed to continue in a reasonable belief that the ticket was merely a receipt or means of identification — *Sandler* v. *Commonwealth Station Co., supra* — or unless there was evidence that from his general observation of the place he should have suspected the substance of the waiver printed on the unread ticket — *U Drive & Tour* v. *System Auto Parks* 71 P. 2d 354 (1937). These issues, important as their consequences for liability are, are distinct from the issue of possession, and the courts have recognised that these issues must be distinguished. For that reason, they will concern us no further.

51. 23 A. 2d 529, 138 A.L.R. 1131 (1942).

> In this case it is necessary to distinguish a bailment from a lease. When personal property is left upon another's premises under circumstances from which either relation might possibly be predicated, the test is whether or not the person leaving the property has made such a delivery as to amount to a relinquishment, for the duration of the relation, of his exclusive possession, control, and dominion over the property, so that the person upon whose premises it is left can exclude, within the limits of the agreement, the possession of all others. If he has, the general rule is that the transaction is a bailment. On the other hand, if there is no such delivery and relinquishment of exclusive possession, and his control and dominion over the goods is dependent in no degree upon the co-operation of the owner of the premises, and his access thereto is in no wise subject to the latter's control, it is generally held that he is a tenant or lessee of the space upon the premises where the goods are kept. Considered from the opposite viewpoint, a tenant, but not a bailor, has the exclusive possession and control of, and dominion over, the portion of the other party's premises where the goods are kept, for the duration of the term of his lease.

Thus, under the old-fashioned conditions, where the customer or client normally handed valuables that he wanted kept especially safely to the manager of his bank or to his solicitor, who then locked them into the bank or office safe and handed the depositor a receipt, there was no doubt that a bailment had been created.[52] On the other hand, there is equally no doubt that where persons are able to gain access to a locker

52. Thus in *U.S. and France* v. *Dollfus Mieg et Cie and Bank of England* [1952] A.C. 582, where many other issues arose, there was no doubt that the Bank had bailment of gold bars sent to be kept in its vaults; but it should be noted that in the more usual arrangement under which the Bank does not undertake to return the same bars, but merely credits their value in gold, the relation created is not that of bailment but that of creditor and debtor. The same applies to more common deposits of funds, drafts, notes, cheques and other negotiable instruments. But in *Bernstein* v. *Northwestern National Bank in Philadelphia* 41 A. 2d 440 (1945), (noted in (1947) 45 Mich. L.R. 908), the plaintiff had put funds into a canvas bag supplied by the Bank and dropped the bag into a night deposit box at the Bank that he was entitled to use as a result of paying a nominal fee; after the Bank failed to credit or find the funds, the Court held that although they were intended for crediting, the placing of them into the night deposit initially created a bailment for mutual benefit with consequent duty of reasonable care upon the bailee. Specific deposits of money, chattels or paper, with instructions to keep separate and return in specie or deal with according to the nature of the paper (present for payment at the appropriate time, *etc.)* similarly create a bailment, even if the accompanying instructions amount to provisions for terminating the bailment at a certain time and then converting the relation into that of creditor and debtor. For a thorough treatment of such complex relations between a bank, its customer-depositor, and third parties see: Ralph J. Baker, "Bank Deposits and Collections", (1913) 11 Mich. L.R. 122 and 210.

Similar difficulties arise in connexion with the deposit of grain in elevators, where it is customary to mingle such grain with a common mass of other deposited grain and of grain bought by the warehouseman, and where the latter normally has authority to sell from the common stock and to replace that which has been sold with other similar grain. These arrangements do not fall plausibly into such exclusive compartments as bailment, lease or sale. The courts have held that the transactions create a tenancy in common of the commingled grain with a special bailment to keep to the warehouseman, this special bailment being accompanied by a power to dissolve the tenancy in common into its constituent tenancies in severalty and a continuous power of sale, substitution and resale: see Street, *Foundations of Legal Liability* (New York, 1906), vol. 2, at pp. 290-1.

by dropping a coin into the lock and then take away the key, the relation created is that of rental, with the possession of the articles deposited remaining in the depositor.[53] In the same way, there is no bailment where a man pays for the right to put his car into a private garage, to which he is given the key and sole right of use;[54] just as there is no bailment where a person deposits in a room of which he or she has exclusive use and the only key, whether such room be in a private house or a warehouse.[55]

The more modern practice followed by an increasingly large number of banks and safety-deposit companies in offering safe-keeping facilities to the public does not fall within any of these paradigm cases. Such banks or companies keep in their vaults numbered tiers of safety-deposit boxes, each of which can be opened only by the use of two keys. One of these (the master key) is retained by the vault proprietors, the other key is delivered to the depositor. Normally the parties enter into a contract by which the proprietors undertake to allow no one but the renter or his authorised agent access to the box and to safeguard whatever property may be deposited in the box. The renter has the right to demand access at certain times and has no duty to inform the company of what is placed into the box; the company, on the other hand, reserves the right to revoke his power to use the box at any time upon notice and imposes rules relating generally to the use of the box and to the access

53. *Marsh v. American Locker Co.* 72 A. 2d 343, 19 A.L.R. 2d 326 (1950); the fact that the rental was for 24 hours only and that an attendant had a master key to enable him to take possession of articles deposited which had not been removed on expiry of the rental period was held not to affect the initial absence of bailment. Neither is there any bailment if the depositor receives the key from an attendant and not by an automatic device; the point in each case is "that the owner of the locker exercises no control over the contents thereof, furnishing only such security as is provided by its system of locks and its general supervision of the lockers and of their use, and, unlike one operating a checkroom, usually does not control access to them": 19 A.L.R. 2d at p. 331.

54. *Lessor* v. *Jones* (1920) 52 D.L.R. 223. As long as there is exclusive control, it makes no difference if the garage is owned by a company, even by one in the haulage business that may itself be using garage space adjacent thereto: *Zucker* v. *Kenworthy Bros., Inc.* 33 A. 2d 349 (1943).

55. *Peers* v. *Sampson* (1824) 4 Dow. & Ry. 636 (room rented in private house and door fastened with padlock of which depositor had the only key — no bailment to owner of house); *Ancona* v. *Rogers* (1876) 1 Ex. D. 285 (where Mrs. H., through an agent, had sent goods for safe-keeping to the house of X, whose wife placed the goods in two rooms, locked them and gave the keys to the agent, who delivered them to Mrs. H. — held that the goods were in the possession of Mrs. H. to whom possession of the rooms had been delivered) ; *Bash* v. *Reading Cold Storage & Ice Co.* 100 Pa. Super. Ct. 359 (1930) (where the plaintiff had exclusive use of and the key to a room in a warehouse where he kept goods — no bailment); *Gruber* v. *Pacific States Sav. & L. Co.* 88 P. 2d 137 (1939) (locked rooms in warehouse with depositor keeping only keys — no bailment). Possession of the only key is the most convenient, but not sole or indispensable, evidence of exclusive control of such rooms. On the other hand, in *Zweere* v. *Thibault*, from which we have cited above, the defendant's claim that he had merely let out a room in his warehouse to the plaintiff failed, the Court holding that the goods had been placed in his care and that his moving them to another room without the owner's prior permission but with her subsequent acquiescence by meeting his bill for the labour involved was evidence that the goods were in fact in his care and possession.

to it. In the typical case, the renter has the right to demand the company's master key, but the company has no power to demand the renter's for the purpose of opening the safety-deposit box.

There is a surprising amount of authority in American case law for the proposition that depositing in a box under these conditions still creates a bailment to the bank; indeed, one might say that this is the dominant view.[56] The argument for this proposition was put most emphatically in *National Safe Deposit Co.* v. *Stead*[57] where the Court said:

> Certainly the person whe rented the box was not in actual possession of its contents. For the valuables were in a safe built into the company's vault, and therefore in a sense 'under the protection of the house'. The owner could not obtain access to the box without being admitted to the vault nor could he open the box without the use of the company's master-key. Both in law, and by the express provisions of the contract, the company stood in such relation to the property as to make it liable if, during the lifetime of the owner, it negligently permitted unauthorised persons to remove the contents, even though it might be under colour of legal process.
>
> . .. .the fact that the safe-deposit company does not know and that it is not expected it shall know, the character or description of the property which is deposited in such deposit box or safe does not change the relation any more than the relation of a bailee who should receive for safekeeping a trunk from the bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor.

Counsel, it is true, have argued, and some courts indeed have held,[58] that the relationship between the renter and the company is that of lessee-lessor and not that of bailment. This view was criticised and rejected in *Morgan* v. *Citizens' Bank*[59], where the Court placed weight on the argument that this could not be so because a landlord or lessor had no rights

56. *Roberts* v. *Stuyvesant Safe Deposit Co.* 25 N.E. 294 (1890); *Lockwood* v. *Manhattan Storage & Warehouse Co.* 50 N.Y.S. 974 (1898); *Mayer v. Brensigner* 54 N.E. 159 (1899); *Cussen* v. *Southern Cal. Savings Bank* 65 P. 1099 (1901); *Shoeman* v. *Temple Safety Deposit Vaults & North Side Savings Bank* 189 III. App. 316 (1914) ; *National Safe Deposit Co.* v. *Stead* 95 N.E. 973 (1911), aff'd as to constitutionality of the statute involved, 232 U.S. 58, 34 Sup. Ct. 209, 58 L.Ed. 504 (1914); *Reading Trust Co.* v. *Thompson* 98 A. 953 (1916); *Schaefer* v. *Washington Safety Deposit Co.* 117 N.E. 781 (1917); *Re Ackerman's Estate* 169 N.Y.S. 1073 (1918); *West Cache Sugar Co.* v. *Hendrickson* 190 P. 946, 11 A.L.R. 216 (1920); *Trainer* v. *Saunders* 113 A. 681, 19 A.L.R. 861 (1921); *Webber v. Bank of Tracy* 225 P. 41 (1924) ; *Security Storage & Trust Co.* v. *Martin* 125 A. 449 (1924); *Young* v. *First National Bank of Oneida* 40 A.L.R. 868, 265 S.W. 681 (1924); *Morgan* v. *Citizens' Bank of Spring Hope* 129 S.E. 585, 42 A.L.R. 1299 (1925); *McDonald* v. *Perkings* 234 P. 456, 40 A.L.R. 868 (1925); *Moon* v. *First National Bank of Benson* 135 A. 114 (1926); *Rosendahl* v. *Lemhi Valley Bank* 251 P. 293 (1926); *Kramer* v. *Grand National Bank of St. Louis* 31 S.W. 2d 961 (1925), noted in (1936) 21 Cornell L.Q. 325. See also 34 Yale L.J. 795 and 133 A.L.R. 280 *et seq.* for other cases.

57. *Supra,* preceding footnote, 95 N.E. at p. 977.

58. *Shakespeare Administrators* v. *Fidelity Trust & Safe Deposit Co.* 97 Pa. 173 (1881); *People ex. rel. Glynn v. Mercantile Safe, Deposit* 143 N.Y.S. 849 (1913); *Rose* v. *Union Savings Bank and Trust Co.* 14 Ohio N.P.N.S. 143, 23 Ohio Dec. N.P. 399 (1913); *Moller* v. *Lincoln Safe Deposit Co.* 174 App. Div. (N.Y.) 458 (1916); *Matter* v. *Acherman* 103 Misc. (N.Y.) 175 (1918); *Carples* v. *Cumberland Coal & Iron Co.* 148 N.E. 185, 39 A.L.R. 1211 (1925); *Wells* v. *Cole (First National Bank & Trust Co. of Minneapolis, Garnishee*) 260 N.W. 520 (1935).

59. 129 S.E. 585, 42 A.L.R. 1299 (1925).

or duties comparable to those characterising the undertaking for safe-keeping.

There is not, I should argue, any force in this suggestion that the relationship between the renter of a box and the company cannot be that of lessee and lessor because the supplementary undertakings entered into by the company have no natural counterpart in the lease of premises. The point is that there is neither inconvenience nor implausibility in treating the company's undertakings as *supplementary,* as not entering into the essence of the relationship of either party to the box and of their consequent relationship to each other, even if these undertakings constitute an inducement for renting. There is no reason, in logic, in practice, or in law, why the lessors of office space in a building should not offer special undertakings to provide a very high degree of security as an inducement for renting, such as landlords already offer special features, discriminatory policies in selecting tenants and restrictive covenants relating to the neighbourhood as such inducement.

Neither is there any force in another important argument used by the Court in *National Safe Deposit Co.* v. *Stead.* It is not correct to say that "both in law, and by the express provisions of the contract, the company stood *in such relation to the property* as to make it liable" (italics added) ; the true position is that the company stood *in such relation to the renter* as to make it liable. Its liability rests on the express or implied terms of a specific contract with the renter, on the fact that the company holds itself out as providing a very high degree of protection, such as is normally associated with vaults, safes and banks. Its liabilities under such undertakings (where there has been consideration) are at least as high as those of a bailee for safe-keeping, but this does not mean that the company thereby accepts bailment. Such bailment would be deduced if the company's duties require it to have possession; the facts of the typical situation, on the contrary, show that the two-key system actually prevents the company from taking physical control of the articles deposited and, for example, misdelivering them.

The liabilities of the company created by its offer to let space for the safe deposit of valuables and by its general character as a presumably prudent institution, habitually keeping and having valuables on its premises, are then quite as high in respect of the contents of the boxes as they would be if the company had bailment of them. As the Court said in *Security Storage and Trust Co.* v. *Martin*[60] "whether the relation was that of bailor and bailee or lessor and lessee its duty and liability were the same."[61] The same point, after some vacillation, was made in *McDonald* v. *Perkins, supra*:

> It is not absolutely essential to determine whether the contract between the plaintiff and the defendant was one of bailment of the goods or of hiring the

60. 125 A. 449 (1924); *cf. Safe Deposit Co. of Pittsburgh* v. *Pollock* 85 Pa. St. 391, 27 Am. Rep. 660 (1877) and *Wilson* v. *Citizens Cent. Bank of Nelsonville* 11 N.E. 2d 118 (1936).

61. A number of cases define this duty as the duty to safeguard the property deposited by taking measures such as are used in the community by an ordinarily careful institution fairly comparable in size and other conditions to safeguard property presumed to be valuable; most of the cases note that this duty is identical with the duty of a bailee for hire where the bailee accepts bailment as a banker or company offering security. See *Young* v. *First National Bank of Oneida* 265 S.W. 682, 40 A.L.R. 868 (1924); *Schmidt* v. *Twin City State Bank* 100 P. 2d 652 (1940); *Bohmont* v. *Moore* 295 N.W. 419 (1940).

> room in which they were stored, because whichever it was, the defendant was bound to exercise ordinary care and prudence in guarding them.[62]

In the vast majority of safety-deposit box cases, then, as in some of the car parking cases discussed earlier, it is not necessary to hold that there is bailment in order to impose liability. This is especially so in these cases, because even the offer of free-safety-deposit box facilities would be regarded at law as a service and undertaking upon consideration.[63]

To hold that there is in these cases no bailment, then, is not to impose any hardship on the depositor whose claim for damages for negligence does not require the bank to have possession of the articles deposited. To hold that there is bailment, on the other hand, forces the depositor to pass certain rights to the bank or company — *e.g.,* the power to garnish upon the deposit; we will thus have the situation in which a man seeking to safeguard his valuables, who has no interest in passing possession of them unless this is a way of obtaining greater security for them, gains no greater security by being able to rely on the liability of a bailee, but does expose his property to an additional insecurity.[64]

The fundamental question, however, cannot be resolved simply according to such convenience: we must consider what the general principles of possession require us to hold in these situations. It is true, as the Court said in *National Safe Deposit Co.* v. *Stead, supra,* that the company's lack of knowledge concerning the contents of the box is not in itself a bar to bailment,[65] and that a man can have bailment of the contents of a locked trunk given to him to keep. But such bailment (and after all it has been the subject of centuries of dispute[66]) is dependent on the recipient's having bailment of the trunk; he must be given power to deal with the trunk in his own interest and convenience, to move it away from danger, keep it in convenient places consistent with his contract, *etc.* The safety-deposit box, though owned by the company, is not like a trunk; it is by its nature fixed, cannot be moved about and is much more plausibly to be treated like a locked room let for storage than like an object deposited with the company. The true parallel to the trunk would be detachable boxes which the company removes to suitable places of safe-keeping at will, bringing them out when requested by customers.

62. *Cf. Wilson* v. *Citizens Cent. Bank, supra:* "Regardless of how the relationship is regarded . .. the rule governing the liability of the party is the same."

63. *McDonald* v. *Leonard Bros.* 134 S.W. 2d 460, 131 A.L.R. 1179 (1939), where free parking maintained by a department store was held to create a bailment of the car that was not gratuitous. Two contradictory decisions on gratuitous or non-gratuitous bailment of articles deposited with bankers by customers without charge — *Giblin* v. *McMullen* (1868) L.R. 2 P.C. 317 (gratuitous) and *Re United Service Co., Johnston's Claim* (1870) L.R. 6 Ch. App. 212 (non-gratuitous) — are not strictly relevant, since the banks were not offering a service but acceding to a customer's request, which is less obviously an inducement to trade.

64. The question whether the contents of the box were bailed to the bank came before the court as result of proceedings to determine whether the contents were the subject of garnishment or attachment and execution in *Kramer* v. *Grand National Bank of St. Louis, supra,* and *Carples* v. *Cumberland Coal & Iron Co., supra.* It should be noted that the power to garnish follows mechanically from the bailment and therefore cannot be used as a test whether such bailment exists.

65. The same argument was used in *Tennessee Hermitage Nat. Bank* v. *Hinds* 1 Tenn. App. 508 (1925). See also 133 A.L.R. 281.

66. *Hartop* v. *Hoare* (1743) 3 Atk. 44 and authorities cited therein.

In such case, we would hold that the contents of these boxes are bailed to the company.

Superficially, the strongest ground for treating the company as a bailee is the absence of untrammelled control on the part of the depositor; his extreme dependence on the company for the physical means of access to the articles deposited in the box. A number of courts have found this a very convincing argument for bailment.[67] But the man who deposits articles in a locked room in a private house or warehouse and is allowed to take away the key is not normally given the key to the front door as well; the fact that he is thus completely dependent on the occupier for access to the locked room has not been held to destroy his possession of the room and its contents. The master key held by the bank or company, it should be noted, is not a means of allowing the bank or company access to the box; it is merely a precautionary device, conceptually and practically nothing but an extension of its means of guarding against wrongful intruders.

In our discussion of the car parking cases, we have emphasised the power or lack of power of the recipient to exclude the depositor from the articles deposited until the deposit is terminated as a crucial test of the existence of bailment. But the crucial quality of this test arises from the fact that the power to exclude even the owner is logically required by that complete control over the property which the recipient must have in order to have possession. The exclusion of the owner counts only if it is part of the exercise of such control. The power of a landlord to exclude his tenant from the building until the tenant checked in or satisfied the caretaker does not count as evidence that the landlord has possession of articles in the tenant's room, or of the room itself, because this power of exclusion is not exercised as part of the landlord's control over the room.[68] Similarly, the bank or company's power to exclude the renter of the safety-deposit box does not count as evidence for its possession of the internal volume of the box and its contents because it is not exercised as part of a direct control over these. The power is exercised regardless of whether any articles are deposited in the renter's box or not — a matter of which the company has and seeks no knowledge; it is part of general arrangement for safeguarding the premises, the vault and the boxes as part of the company's undertaking to depositors and of the normal vigilance associated with its business. The mere fact that this extremely close supervision and guard can be carried out without

67. *E.g., Lockwood* v. *Manhattan Storage & Warehouse Co., supra:* "It is urged upon the part of the defendant that it was not the bailee, because it was not in possession of the plaintiff's property. If it was not, it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property without the consent and active participation of the defendant. She could not go into her safe unless the defendant used its key first and then allowed her to open her box with her own key, — thus absolutely controlling the access of the plaintiff to that which she had deposited within the safe. The vault was the defendant's and was in its custody, and its contents were under the same conditions. As well it might be said that a warehouseman was not in possession of silks in boxes deposited with him as warehouseman, because the boxes were nailed up and he had not access to them."

68. The fact that a landlord may control the access of a tenant just as the bank or company controls the access of the renter without acquiring possession of the tenant's room is emphasised in *People ex rel. Glynn* v. *Mercantile Safe Deposit, supra,* and in *Wells v. Cole, supra,* where the courts found no bailment.

the company's in any way requiring to have direct control over the contents of the boxes is further reason for supposing that vigilance is not evidence of a possession it neither requires nor seeks. In other words, the company's power to exclude the depositor is not the power to exclude him from actual control of the articles deposited, as required for bailment, but the power to exclude him from *reaching* these articles.

The same distinction, it seems to me, should be applied to those locker cases where, in place of dropping a coin in the locker and receiving a key, the depositor has the locker opened for him by an attendant with keys. Thus, in *Greenwood* v. *Council of the Municipality of Waverley*,[69] the plaintiff hired a locker in the defendants' bathing shed to leave his clothes and valuables while bathing; the locker was unlocked for him by an attendant, who gave him an identification disc but kept the key. The locker room contained a bell enabling bathers to summon the attendant to open the lockers when they returned; after the plaintiff had done so, it was found that his clothes and valuables were missing. The District Court held there was liability under a contract of bailment. The view that there is bailment here, I should argue, is mistaken. The attendant acts as the bather's instrument in opening the locker; his retention of the key does not carry with it a right to open the locker except on the bather's instruction. In so far as the bather is excluded until he has summoned the attendant, he is excluded from reaching the things and not from his control over them. The attendant's having the key, on the other hand, though it gives him physical power to reach the things, does not give him control of these things because he manifests no intention of assuming such control and, in fact, makes no attempt to reach them.[70] On appeal, Ferguson, J., held that the first question was whether there was bailment or mere letting of a locker; though he did not decide this question, he held that the express finding of the lower court that there was negligence in the defendants' failure to maintain continuous watch in the locker room was not supported by any facts showing a duty to do so and therefore sent the case back for retrial to determine as a matter of fact the duties imposed on the defendants by the contract, whether that contract be one of bailment, simple letting, or letting where the defendants "undertook a larger measure of responsibility". If, indeed, one were to look at the background situation again, one would find an additional argument against bailment: the retention of the key by the attendant is virtually required by the conditions of bathing, where bathers could easily lose keys in the water and have nowhere else to keep them; this is further ground, then, for supposing that the retention of the key by the attendant is not designed to give him control of articles deposited but is a convenience for bathers and an attempt to preserve the keys themselves from loss.

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69. [1928] S.R. (N.S.W.) 219.

70. If he did make such an attempt, he would commit trespass and where possession is claimed on the basis of a unilateral act attempting to gain control without delivery or consent, the law will require especially clear evidence that such control has been attained.

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