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Richard H. Helmholz

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Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care

R.H. Helmholz*

I. INTRODUCTION

Two assertions about the law of bailments seem to command general assent. The first is that bailments are best defined simply as the rightful possession of a chattel by one who is not also the owner. Describing bailments as inherently contractual in nature or thinking of them as based upon a duty to preserve and redeliver the goods in an undamaged state today appears to be a relic of the long distant past, when the obligations of a bailee were once absolute. The simpler, property-based definition of bailments is the most accurate. The second assertion is that the liability of bailees for loss or damage to the goods in their possession is properly measured by a standard of ordinary care.

1. The most influential expression of this view is found in William K. Laidlaw, Principles of Bailment, 16 CORNELL L.Q. 286, 287 (1931) ("Although it is frequently said that bailment is founded upon contract, the actual decisions show that it is not so founded."). See also F.H. Lawson & Bernard Rudden, The Law of Property 81-82, 96-97 (2d ed. 1982); Alice Erh-Soon Tay, The Essence of a Bailment: Contract, Agreement or Possession?, 5 SYDNEY L. REV. 239 (1966).

2. See Kurt Philip Antor, Note, Bailment Liability: Toward a Standard of Reasonable Care, 61 S. CAL. L. REV. 2117, 2125-27 (1988) [hereinafter Bailment Liability]; see also Peter N. Cubita, Recent Development, Proof of Delivery and Unexplained Failure of Warehouse to Return Stored Property Upon Demand Held to Establish Prima Facie Case of Conversion, 55 ST. JOHN'S L. REV. 203, 203 n.163 (1980) ("[I]t is well settled that the liability of a bailee now is grounded in negligence.").

3. The fundamental article remains Sheldon D. Elliott, Degrees of Negligence, 6 S. CAL. L. REV. 91 (1933). The present article does not deal with the questions dealt with in Elliott's article: the rationale, the faults, and the persistence of the three-tier test. The three-tier test varies the applicable degree of negligence according to the party who stands to benefit from the bailment. The law on this question is brought up to date and discussed in Bailment Liability, supra note 2.

* R.H. Helmholz, Ruth Wyatt Rosenson Professor of Law, University of Chicago. The author would like to acknowledge the kind and helpful comments on an earlier version of this article by Professor Stephen G. Gilles.


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to judge from the presentation found in the hornbooks and casebooks used in American law schools, the old controversy about the underlying nature of the bailee's responsibility in caring for the goods of the bailor is now primarily a matter of historical interest.

Samuel Williston gave the classic formulation to this property-based understanding of bailments. Although he recognized that bailments were in fact often based upon agreement, Williston maintained that only an analysis that regarded lawful possession as the one essential element of a bailment could encompass involuntary, gratuitous, and implied bailments. For example, it makes little sense to think in contractual terms of the relationship between a finder of lost goods and their owner. Any agreement between them must be purely imaginary, and it requires a large leap of the imagination to find any consideration in such a relationship. Yet they are beyond doubt bailor and bailee. For Williston, as for other commentators, it stretches common sense too far to regard finder and owner as bound by the terms of an implied contract. Rather, it is much better to define their mutual obligations as based simply upon the rightful possession of goods by one who is not the owner.

A second advantage of the property-based analysis is that it better accords with defining the duty of care owed to bailors by bailees in terms of ordinary negligence, whereas a contractual

4. See Ray A. Brown, The Law of Personal Property § 10.1, at 210 (Walter B. Raushenbush ed., 3d ed. 1975) ("A great deal of this uncertainty and casuistry would have been avoided had the broader definition of bailment been adopted at the beginning."); D. Barlow Burke, Jr., Personal Property in a Nutshell 134 (1983) (the law "would probably be better served" by rejecting "the fiction of a constructive bailment" in favor of the property based definition); John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property 86 (3d ed. 1989) (essence of bailment is "the transfer of the possession of personal property, without the transfer of ownership").


6. 9 Samuel S. Williston, Treatise on the Law of Contracts § 1030, at 875 (Walter H. Jaeger ed., 3d ed. 1967); see also Zuppa v. Hertz Corp., 268 A.2d 364, 366 (Essex County Ct., N.J. 1970) ("It is the element of lawful possession, however created, that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not."); 2 Thomas A. Street, Foundations of Legal Liability 308 (1906).
analysis of bailments better fits a system of strict liability. Although, logically, there may be no necessary connection between the theory of bailment adopted and the standard of liability applied, in fact the connection is often made in the case law, and indeed it seems altogether appropriate. Strict liability is the normal rule for cases involving breach of contract or deliberate wrong. Negligence is the normal rule for cases involving accidental loss or damage to the property of others — the usual situation in bailment cases. It seems entirely sensible, therefore, at least in the absence of particular and special circumstances, to connect the property-based analysis of bailments with the uniform standard of ordinary care.

It is true enough that most hornbooks and casebooks do mention one exception to this uniform standard of liability — the case of misdelivery. If the bailee delivers the bailed goods to the wrong person, the law traditionally has imposed strict liability on the bailee. This rule is still followed in many jurisdictions. Today, however, the misdelivery exception appears anomalous. Why should bailees be liable only for negligence if the goods are destroyed or damaged, but held to a standard of absolute liability when, through no fault of their own, the goods wind up in the hands of someone other than the owner? It is hard to see any good reason. The misdelivery exception now seems to represent merely an isolated holdover from the older, but now discredited, view that treated bailments as contractual in nature and consequently visited liability without fault upon the bailee. Aside from this one exception, the accepted view holds that a uniform standard of ordinary care prevails. Thus, ordinary negligence defines the liability of bailees.

This Article challenges this consensus as a statement of the law as actually applied in modern American decisions. The Article’s conclusion is that the property-based conception of bailments and the uniform standard of negligence that accompanies it have not in fact triumphed in much of our decisional law. Contract and conversion theories continue to play a larger role in the modern law of bailments than textbooks suggest, and this role is important in practice. The search for a uniform standard has not yet succeeded.

7. See Restatement (Second) of Torts § 234 (1965); Brown, supra note 4, § II.7.
8. See, e.g., Potomac Ins. Co. v. Nickson, 231 P. 445, 448 (Utah 1924) (“[A]t first blush it may seem that in all cases where the bailee is deceived or tricked into delivering the property he should be excused unless he was guilty of negligence in making the delivery. Such, however, is not the law.”).
9. See, e.g., Kurtz & Hovenkamp, supra note 5, at 159.
II. Scope of This Study

There has been no systematic treatise devoted to the American law of bailments in more than sixty years. Law review articles devoted to the subject can be counted on the fingers of two hands. The subject is distinctly out of fashion. However, even if one makes full allowance for the lamentable decline in the publication of scholarship devoted to legal doctrine, it does seem strange that this subject should be so wholly neglected. A sizeable number of bailment cases continue to come before American courts, including many in which a decision awarding recovery based upon a bailment theory seems to have been "sprung" on one of the parties. It seems inherently unlikely that these cases should be unworthy of comment or analysis. Moreover, the bailment continues to be a pervasive transaction in modern life. It is true that statutes have been enacted to cover many aspects of modern commercial life in which the common law of bailments once ruled


11. See supra notes 1-3; infra note 12.

12. See, e.g., Allen v. Hyatt Regency-Nashville Hotel, 668 S.W.2d 286, 288 (Tenn. 1984) (rejecting alternate approach adopted by New Jersey court, in favor of traditional bailment analysis as "the most satisfactory and realistic approach to the problem" of liability of owners of parking garages). This general point was first brought to my attention by Roger A. Cunningham, Adverse Possession and Subjective Intent: A Reply to Professor Helmholz, 64 WASH. U. L.Q. 1, 2 (1986), an article which provided the impetus for my curiosity about this subject. In some respects, the law of bailments actually covers more of life's everyday transactions than it once did. See A. Darby Dickerson, Note, Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments, 41 VAND. L. REV. 129 (1988) [hereinafter Bailor Beware]; Note, Cintrone v. Hertz Truck Leasing & Rental Service, Products Liability: The Extension of Strict Liability to Non-Sale Transactions, 61 NW. U. L. REV. 144, 145 n.3 (1966).

13. See, e.g., Colgate Palmolive Co. v. S/S Dart Canada, 724 F.2d 313 (2d Cir. 1983) (admiralty dispute assumedly governed by Carriage of Goods by Sea Act decided as a bailment case); Arsbery v. State, 32 Ill. Ct. Cl. 127 (1978) (treating State as bailee of articles in prisoner's cell when prisoners were evacuated after a prison riot rendered the cellhouse uninhabitable); Merchants Leasing Co. v. Clark, 540 P.2d 922 (Wash. Ct. App. 1975) (lessor repossessing pressure cooker used in preparing chickens in tavern held to be bailee and liable for conversion when he sold it).

14. See Bailment Liability, supra note 2, at 2121.
UNCHALLENGED.\(^{15}\) However, these statutes have by no means occupied the field, and the statutes themselves are usually interpreted according to standards inherited from the common law of bailments.\(^{16}\) Given the combination of scholarly neglect and the large sums of money at stake in many of these cases, examination of the modern case law relating to the liability of bailees appears to be a doubly useful enterprise.

This Article grows out of such an examination. In Parts III through VIII, the Article analyzes the following categories of bailment cases: Cases involving (III) procedural rules, (IV) contractual terms and the duty to return bailed goods unharmed, (V) deviations from contractual terms, (VI) conversion by bailees, (VII) misdelivery by the bailee, and (VIII) limitations on the liability of bailees. The Article’s intent is (1) to test the validity of the property-based view of bailments as a description of current law as enforced in American courts; and (2) to explore the implications of the evidence for describing and fixing the liability of bailees. Its conclusions, therefore, do not necessarily challenge Williston’s analysis directly. His argument that not all bailments can be fitted easily within a contractual framework is unanswerable.\(^{17}\) Moreover, the preference for a uniform standard of reasonable care in cases of loss or damage is cogent and appealing. However, that cannot be the end of the matter. Whether this view adequately describes what happens in the ordinary run of bailment cases is a different and important question, and it is the subject of this study.

This study is based on the author’s examination of most of the appellate decisions involving a bailee’s liability to the bailor decided by American courts since the last American treatise on the subject appeared in 1929. Its conclusions depend on those cases in which the judge found that it made a substantive difference whether one theory or another was applied to the question of defining the standard of a bailee’s liability. In many of the cases uncovered by the examination, perhaps the majority, the theory applied by the judge made little difference in the outcome of the case. Plaintiffs in these cases often pleaded one count in negligence and, alternatively, one count in breach of contract.\(^{18}\) But either way the results turned out to be the same.

However, stopping with these cases would leave a large number of cases unaccounted for. In addition, it would give an inadequate

\(^{15}\) See 2 JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 21-2, at 135 (3d ed. 1988).

\(^{16}\) See id. § 21-3, at 147-48.

\(^{17}\) See WILLISTON, supra note 6, § 1030, at 876-77.

\(^{18}\) See infra pp. 10-13.
account of the broad range of issues that have arisen in litigation. An examination of the cases decided since 1929 shows that decisions analyzing bailments solely in possessory terms and discussing liability as if it were based invariably upon a uniform standard of ordinary care are seriously incomplete. They overemphasize the degree to which the contractual and delictual elements have fallen out of the modern law of bailments, and they minimize the variety of ways in which bailees have been found liable to bailors. On this account they may mislead. In fact, the exception for misdelivery is only one of the ways in which alternative theories of liability remain crucial in the decisional law of bailments. Bailees are frequently held to a higher standard of care, and this occurs because courts apply standards drawn from the law of contracts and conversion.

III. PROCEDURAL RULES

I begin with an area where some real progress has been made in harmonizing the treatment of bailment problems — allocating the burden of proof. This area provides a benchmark against which the continuing lack of uniformity in other areas of the law can be measured. The theoretical difference between contract-based and property-based analyses here is simple and dramatic. If a negligence standard is applied in cases where the goods have been lost or damaged, it will be incumbent upon the bailor to prove that the bailee’s lack of ordinary care has caused the loss. The party alleging negligence, the bailor, must accept the burden of proof. Of course, the doctrine of res ipsa loquitur may come to the aid of bailors in appropriate circumstances, but the risk of nonpersuasion nonetheless remains on them.

If, on the other hand, the bailment is defined as a contract requiring redelivery of the item bailed, then quite a different result is reached. Like any promisor, bailees who fail to live up to their contractual obligation become prima facie liable for breach of contract. To escape liability, bailees must plead and prove an adequate excuse — force majeure for example. The ultimate risk of nonpersuasion, then, rests squarely on the bailees.

19. See generally Robert M. Sweet, Burden of Proof of Bailee's Negligence in Connection with His Failure to Redeliver, 8 Hastings L.J. 89 (1956) (discussing the impact of burden of proof allocation on cases involving bailee's failure to redeliver bailed goods).

20. See, e.g., Royster v. Pittman, 691 S.W.2d 305, 308 (Mo. App. 1985) (unexplained appearance of scratches, gouging, and breakage among antique furniture left with bailee raised inference of negligence under res ipsa loquitur doctrine).

21. Id.
Were these theories rigidly applied in practice, bailors would proceed on a contract theory whenever the burden of proof issue presented an obstacle to recovery. The search for a fair standard of reasonable care would be lost in consequence. However, this has not happened. The very starkness of this theoretical dilemma has prompted American courts to move towards a more uniform treatment in dealing with questions of allocating the burden of proof. In the last sixty years, courts have often struggled with what Justice Traynor once described as "conflicting and confusing" precedents. Today, however, most jurisdictions have reached a realistic solution. Under the rule adopted in these jurisdictions, if the bailor proves the bailee's failure to return the goods in the appropriate condition, the burden of going forward with evidence to explain the loss or damage falls upon the bailee. If the bailee fails to explain how the disappearance or damage occurred, then judgment will be for the bailor. If the bailee does produce such evidence, however, the ultimate burden of proof will return to the bailor. The bailor will bear the burden of showing that the loss occurred through the bailee's negligence, and the bailee will be entitled to a jury instruction to that effect. For example, if the bailee comes forward with evidence showing that the goods were destroyed by a fire, the bailor will bear the burden of showing that the fire was started by the negligence of the bailee. If the bailor produces no evidence showing that the bailee was at fault, then the bailor is out of court. Under this formulation of the law, it makes no difference whether the bailor brings the action *ex contractu* or *ex delicto*. The result is the same.

A few American jurisdictions have adopted the exact opposite rule, holding that both the burden of producing evidence and the

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24. See, e.g., Scott, 402 S.E.2d at 356.
25. Id.
26. Id.
27. See, e.g., Lewis, 12 So. 2d at 547.
28. See id.
ultimate burden of proving due care rest with the bailee.²⁹ This result is justified by the supposition that bailees enjoy superior access to knowledge about the loss, the assumption that bailees will exercise greater care if the burden is placed upon them, and the argument that bailees have greater ability to secure insurance so as to spread the loss.³⁰ Whether this minority rule is preferable to the majority view is certainly open to question.³¹ However, the crucial point is that the courts in states that adopt the minority rule now reach the same result whether the action is framed in contract or in tort. The allocation of the burden of going forward with the evidence and the ultimate burden of proof remain the same no matter which theory of bailment is adopted.

These alternative solutions to the theoretical dilemma, endorsed by courts and by most commentators, have come to dominate the case law. There do continue to be exceptional decisions in which a contract theory is used to hold that the bailee is under a duty to prove the exercise of due care on his part, whereas the opposite result might have been reached had the suit been framed in terms of simple possession.³² However, these cases now represent a truly


³⁰. See, e.g., Low, 503 P.2d at 294-96.


³². E.g., C.V. Sohn, Inc. v. J.W. Milligan, Inc., 741 S.W.2d 60, 63 (Mo. Ct. App. 1987) ("[T]he bailee must prove exercise of due care on its part."); Ryan v. Park-Rite Corp., 573 S.W.2d 450, 452 (Mo. Ct. App. 1978) ("In a bailment action which is based on breach of a bailment contract, . . . [failure to redeliver] has been shown, the burden then rests upon the bailee to prove its exercise of ordinary care."); Broadview Leasing Co. v. Cape Cent. Airways, Inc., 539 S.W.2d 553, 561 (Mo. Ct. App. 1976) ("[W]here the theory of the bailor's action is based on breach of contract, the burden of proof lies with the bailee to plead and prove due care on its part."); Gutknecht v. Wagner Bros. Moving & Storage Co., 266 S.W.2d 19, 22 (Mo. Ct. App. 1954) (criticizing the "failure . . . to distinguish between an action based on the negligence of the warehouseman and an action founded upon the contract of bailment"); see also Metropolitan Vacuum Cleaner Co. v. Douglas-Guardian Warehouse Corp., 208 F. Supp. 195, 196 (S.D.N.Y. 1962) ("Defendant did, however, have the duty to comply with its contract of bailment, and its failure to do so renders it liable to answer for conversion."); A.A.A. Parking, Inc. v. Bigger, 149 S.E.2d 255, 258 (Ga. Ct. App. 1966) (action available in contract, although one would not lie in tort, where the plaintiff's car had been stolen and the statement of claim "charged only a failure to continue performance of defendant's duties under a bailment contract, or nonfeasance"); Weinberg v. D-M Restaurant Corp., 426 N.E.2d 459,
small part of appellate litigation, and it is often unclear under the facts of these cases whether the result would have actually been different had one or the other theory of bailment been rigorously applied. The most that can be said is that some decisions have seemed to conclude that it made a difference whether the complaint was framed in tort or in contract. But the more salient fact is how few such decisions there have been.

This progress, however, has not resulted in the entire absence of difficulty. The most difficult cases dealing with the allocation of the burden of proof have been those in which neither the bailee nor the bailor could explain how the loss occurred. These cases offer a test of the question and are deserving of treatment on that account. Even here, the cases demonstrate that some progress towards uniformity has taken place. In many of the cases, neither party knew what had happened, and by the time of trial there was simply no way to discover the actual cause of the loss. Sometimes bailees in such cases could allege a plausible reason for the loss to the goods, but only in the most general terms. Bailees may allege for instance that, all things considered, the goods "must have been stolen." In these situations, bailees have relied on a general showing that they had adopted adequate safety procedures to prevent loss or harm, arguing that the bailor should bear the burden of showing some inadequacy in those procedures.

In such cases of uncertainty, which side prevails? The outcome inevitably turns on the procedural question of which party bears the burden of proof, and it is not altogether obvious where the burden should lie. A common example is when a bank's regular customer alleges that its employee left a bag containing money in the bank's night deposit box, but the bag is never found. At

463 (N.Y. 1981) (recovery for conversion precluded by fact that plaintiff pleaded only negligence in loss of fur coat checked in restaurant cloakroom); David v. Lose, 218 N.E.2d 442, 445 (Ohio 1966) ("The Court of Appeals failed to recognize that the question is not whether the plaintiff has established negligence but whether the defendants have established a legal excuse for breach of the contract.").

35. Id. at 876.
trial, no one can account for the loss. The bank will aver that it
operated a secure system, and the customer will aver that the
employee had made the deposit in accordance with its normal
practice. But that is all that either side will be able to show. These
facts will be treated as creating a bailment by most American
courts, and the question of liability will normally be determined
by deciding which side bears the ultimate burden of proof.

In dealing with such cases, treating the bailment as a contract
offers a tempting way out of the dilemma. It can be argued that
since the bailee has neither fulfilled the contractual obligation to
redeliver the goods nor proffered a provable explanation for that
failure, liability necessarily follows as a matter of law. A few
courts have seized upon this possibility. As one Ohio court saw
it, "[T]he duty to redeliver is not based on negligence and is
excused only if there has been a loss without fault or want of care
on the bailee's part."38 The bailee bears the burden of showing its
due care. If there is "no evidence to how or when the loss occurred,
and [the] court is left to speculate on that matter," the bailor will
be entitled to judgment due to the bailee's default on a contractual
obligation.39

It is a measure of the progress made in this area of the law
that, during recent years, only a few American courts have relied
upon this distinction between contract and tort theories in such
difficult bailment cases. When the loss cannot be specifically
accounted for, most courts have placed the risk of nonpersuasion
on the bailee, but have framed the decision in terms of a pre-
sumption of negligence. In other words, they have not based their
decision on a contractual analysis of the bailment, but on their
understanding of the proper reach of the law of proof. One New
York court summed up the feeling underlying the result by stating

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39. Id. at 522; see also Gebert v. Yank, 218 Cal. Rptr. 585, 591 (Cal. Ct. App. 1985)
(allowing verdict against bailee for breach of bailment contract to care for horses although
jury had found against bailor on the issue of negligence); Procter & Gamble Distrib. Co.
v. Lawrence Am. Field Warehousing Corp., 213 N.E.2d 873, 881 (N.Y. 1965) (citing with
approval the lower court's assertion that it is "self-contradictory for a warehouseman
simultaneously to assert due care and total lack of knowledge of what happened"); Phillips
rev'd on other grounds, 354 A.2d 542 (Pa. 1976) (action brought for breach of contract
to safeguard funds left in night depository safe, but without alleging negligence, leaves
only issue of creation of bailment for decision by jury where funds could not be found).

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User of a Bank's Night Depository Facilities, 70 Banking L.J. 121 (1953).
that "[t]he total ignorance of the bailees instead of being an excuse is the measure of their fault." 40 Bailees cannot overcome the presumption of negligence unless they can show what actually happened. Pleading ignorance of the circumstances may exacerbate their blameworthiness. 41 Even in this difficult class of cases, therefore, today the same result is reached regardless of the bailment theory being applied. Procedural rules are used to allocate the burden of showing negligence according to a rational decision about which side should bear that burden, not according to whether the action has been defined in terms of negligence, contract, or conversion.

Unfortunately, the same advances have not occurred with respect to all procedural questions, although, during the past sixty years, other procedural issues have arisen in appellate litigation with much less frequency. 42 Bailment cases dealing with statutes of limitation provide one illustration. In this area of the law, the contractual concept of a bailment continues to lead a vigorous life, resulting in occasional confusion and unpredictability. The problem is caused by the widespread existence of two different statutes of limitation, one for actions in contract and another for actions in tort. Normally, the statute of limitations applied to actions brought in contract is of a longer duration than that applied to actions brought in tort. Accordingly, it will be in the interests of bailors to invoke the former. Can they do so? If they can, an obstacle will have been created for adoption of a uniform standard of reasonable care.

There have not been many cases on this subject, 43 but recent cases suggest that a choice of theory may still be available to

42. Some of the other essentially procedural questions in which the outcome may depend on whether the matter is analyzed in terms of contract or tort include the proper measure of damages, availability of punitive damages, survival of the cause of action, and proper choice of law. See generally WILLIAM L. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 422-52 (1954).
43. The most common problem in applying statutes of limitation has been the question of determining when the cause of action accrued because many bailments do not set a specific termination date. In such circumstances it is generally held that the statute begins
bailors, at least when the bailed items have disappeared or have been destroyed. One example is *Baratta v. Kozlowski*, a New York case in which the plaintiff brought an action against a bailee for conversion of bonds owned by the plaintiff. The Appellate Division applied the six-year contractual statute of limitations, rather than the three-year statute ordinarily used for tort claims. The judge found that this claim "had its genesis in the contractual relationship of the parties," frankly admitting that he was allowing bailors to "select a remedy less likely to be frustrated by time restrictions." The same result has been reached in other jurisdictions, though not always with the same candor about the advantage being accorded to bailors. On the other hand, there are also cases in which it has been held that the tort statute of limitations must always be applied in such actions. As is evident, harmony has not been achieved. It is little wonder that a trial lawyer's practice manual includes a section entitled "Selecting a Favorable Statute" that furnishes pointers for bailment cases.


45. Id. at 809.
47. 464 N.Y.S.2d at 809.
49. *Underwriters at Lloyd's v. Peerless Storage Co.*, 404 F. Supp. 492, 496 (S.D. Ohio 1975), aff'd, 561 F.2d 20, 24 (6th Cir. 1977); see also *Cincinnati Ins. Co. v. Vulcan Materials Co.*, 587 F. Supp. 466, 468 (N.D. Ala. 1984) (holding that action was in contract and not barred by the one-year statute of limitations), rev'd, 762 F.2d 1021 (11th Cir. 1985); *Starns v. Emmons*, 524 So. 2d 251, 253 (La. Ct. App. 1988) (holding action to be in contract and applying the statute of limitations for actions in contract), rev'd, 538 So. 2d 275, 277 (La. 1989) (holding that the shorter, liberative statute of limitations applied, notwithstanding that one count was brought for breach of contract).
is framed and on which theory of bailment is invoked. However, in dealing with the most frequently contested question — allocating the burden of proof — the search for a uniform standard that focuses realistically on establishing which party was most likely at fault has been largely successful. Today, few American jurisdictions render a decision dependent upon the theory of bailment employed. There is now a majority and a minority rule on the question of upon whom the ultimate burden of proof lies. Most states put the burden of proving negligence on the bailor and require the bailee to bear only the initial burden of producing evidence of how the loss occurred. A sizeable minority places the ultimate burden on the bailee in every instance. However, within any particular jurisdiction the rule is uniform. The courts treat all bailment cases alike. That is progress.

IV. CONTRACTUAL TERMS AND THE DUTY TO RETURN BAILED GOODS UNHARMED

The search for a uniform standard of liability based upon fault has not fared as well in other areas of bailment law. Conspicuous among the failures are the cases in which the bailor asserts that, by the terms of the bailment itself, the bailee had assumed a formal duty to return the bailed items unharmed, rendering the question of negligence legally irrelevant. In these circumstances, when the goods have been damaged or lost without fault on the part of the bailee, the cases decided since 1929 have not been harmonious. Unlike the situation in the recent case law relating to the burden of proof, too often the outcome of disputes seems to have been determined by whether the court chose to focus its attention on the bailment as inherently contract based or inherently property based.

Under any regime, bailors and bailees are of course free to vary the terms of the bailee's liability by contract. Bailees may become insurers of the property in their possession by special agreement, and there will always be circumstances in which it is quite appropriate for them to take on that additional burden. The real difficulties have lain in deciding whether a bailee has in fact done so. In such cases, bailment theory has made a real difference. The theory adopted has fixed the allocation of liability. The root cause of the difficulties is that bailees often do not fully think through the range of possibilities of loss that exist. They do not contemplate the unexpected, and this natural lack of foresight may cause

51. See BROWN, supra note 4, § 11.5, at 274.
ambiguity as to whether they have in fact intended to assume an absolute responsibility to return the goods unharmed. Bailors will argue that the bailees have assumed an absolute responsibility; bailees will argue that they have not. The result will turn on the interpretation of contractual language that was not at all designed to cover the loss that actually occurred. Too often the cases show that the final result frustrates all attempts to secure a uniform standard of negligence-based liability.

The ordinary rule gives only a hint of the trouble in this area. It is hornbook law that a promise to return the goods will not of itself establish responsibility when the goods cannot be returned because they have been destroyed or lost. Such a promise is usually held to mean only that the bailee agreed to fulfill the bailee's ordinary duty to return the chattel at the end of the bailment. No responsibility for theft or purely accidental loss attaches to the bailee. However, where there exists only slightly more than an agreement to return the chattel — for instance, a promise to return the chattels in good order, to give them back in the same condition as received, or even to return them or pay their price — then American courts are divided. Some have stuck with a property-based understanding of bailments. Others, however, have not. They have pointedly determined that "it is [the bailee's] contract which must measure the extent of his liability," and, if there has been damage, this contractual undertaking results in liability without fault.

An unexceptional Arkansas case illustrates both the pattern and the problem underlying a bailee's promise to re deliver the bailor's goods in a specified condition. The defendant in the case leased a truck, agreeing in one of the lease's several provisions "to surrender the same at the expiration of the term of this lease in good condition." The truck was damaged in a collision for which the defendant was in no way at fault, and he returned it in its damaged state. In the suit by the truck's owner, the Arkansas court held that the quoted contractual provision rendered the lessee liable without any showing of negligence on his part. The court admitted that the lessee, as a bailee, would not otherwise be liable for the loss, and it acknowledged the existence of contrary au-

55. Id. at 276.
56. Id. at 278.
Nevertheless, the judge reasoned that any other result would render the contractual language mere "surplusage" and would thereby give the bailment contract a "construction which entirely neutralizes one provision." Because the bailment was in essence a contract, the judge held that a separate and distinct meaning had to be given to each of its terms.

The artificiality of the court's holding is apparent. Under the court's analysis, the result will vary dramatically depending on slight variations in wording. The distinction between language agreeing simply to return a specific item and language agreeing to return it in the condition in which it had originally been received by the bailee will often be tenuous, thereby inviting anomalous results. Moreover, the distinction imputes an intent to bailees that very often exceeds their reasonable understanding at the time of entering into the bailment. Most people who agree to return property in good condition mean that they will take good care of it. They do not mean to become insurers of its continued existence. For example, the person who borrows a horse and promises to give it back in good condition means to guarantee that the horse will be well treated, not that it will not be allowed to die of natural causes. The borrower of an automobile who promises to return it in the same condition as it was received means to guarantee that it will be kept in good repair, not that the automobile will never be stolen. None of these bailees intends to become an insurer. Nevertheless, this is the result that emphasizing the contractual side of bailments allows — a result that has been reached in a great many of cases decided since 1929.

Courts begin with what one judge described as a "careful reading of the provisions of the contract." They then proceed to hold that the existence of any contractual language implying a responsibility to do more than simply return the item effectively makes the bailee an insurer. As a Nebraska court stated in a case where the bailee had agreed to return an automobile "in substantially the same condition" as it had been received, "[t]he question here...
is not that of defendant's exercise of due care, [but] ... of defendant's liability for a breach of its admitted contract."63

In such cases, it will not necessarily matter that the original promise had been equivocal or that the original promise was purely oral. In a recent Indiana case, for instance, the evidence showed that the bailee of a truck had done nothing more elaborate than to say, "he would bring it back, just like, you know, just like he got it."64 The truck was later stolen from the bailee's possession, and the court held that he was liable without any showing of negligence on his part. "To rule otherwise," the Indiana judge announced, "would strain the law of contracts."65 The fact that his decision strained the uniform standard of negligence-based liability well beyond the breaking point did not appear to trouble him. Nevertheless, many of his colleagues on the bench have felt the same way.66

It is quite true that some of the relevant cases decided since 1929 have held the opposite — that bailees assume no added burden by agreeing to return the item in the same condition as received.67 Most of the sparse commentary on the subject approves of these cases, sometimes treating them as stating the dominant rule.68 But the truth is that there is no dominant rule. Indeed, it is difficult to see how, in the present state of things, there can ever be a dominant rule.69 Since the question must always be whether or not a particular bailee has in fact agreed to assume a greater burden than that of reasonable care, each case must be

65. Id. at 874.
66. Other cases of recovery based on similar oral undertakings: Industron Corp. v. Waltham Door & Window Co., 190 N.E.2d 211 (Mass. 1963); Thummel v. Krewson, 764 S.W.2d 700 (Mo. Ct. App. 1989); Bozell & Jacobs, Inc., 75 N.W.2d at 366.
67. See, e.g., Barret v. Ivison, 57 S.W.2d 1005, 1006 (Ky. 1943) (promise to return boat "at least as clean as it was when it was received" did not create absolute liability when boat was burned without fault of bailee); Davis v. Lampert Agency, Inc., 291 N.Y.S.2d 745 (N.Y. App. Div. 1968) (promise to return "in the condition that it was leased" merely restates bailee's ordinary obligation, but does not enlarge it); Loeb v. Ferber, 30 A.2d 126, 127 (Pa. 1943) (term in storage agreement obliging bailee "to return the said articles in the same condition as when received by me" held merely to restate bailee's obligation to use due care).
69. See BROWN, supra note 4, § 11.5, at 275-76 ("[I]t has been well said that precedents of other cases are of little value.").
decided on its own facts. It will always be in the interests of bailors to stress the contractual side of the bailment in contending that the bailee has assumed a greater burden than that of reasonable care. Economic advantage motivates bailors to make this argument because minuscule differences in contract wording may turn out to have large economic consequences. Existing case law allows, and even encourages, American courts to accept the argument. The overall result is uncertainty and even anomaly in the cases. The inevitable casualty is the uniform standard of negligence-based liability.

V. "DEVIATIONS" FROM CONTRACTUAL TERMS

The contractual understanding of bailments has also encouraged a second type of exception to the negligence-based rule of liability in cases where it could be alleged that the bailee had acted contrary to a basic term of the bailment agreement. In these situations, commonly described as either "deviations" or "departures" from the contract of bailment, the liability of bailees for the value of the bailed chattel becomes absolute, and lack of fault will not absolve them. As a leading case put it, "If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing." Many similar cases have been decided in recent years. Unlike the cases involving promises to return goods unharmed, the deviation and


departure cases do not depend on a "careful reading" of contractual language. They do, however, demonstrate the continuing vitality of the notion that bailments may be regarded properly as contracts. In addition, they provide further explanation for the elusiveness of a uniform standard of liability.

One case in particular well illustrates the way in which the above theory has been employed to impose strict liability on bailees. This Massachusetts decision of 1951\(^2\) involved an agreement to store household furniture. During the course of the bailment, the storage company moved the furniture from the fifth floor of their facility to the basement. While in the basement, the furniture was destroyed by fire, apparently without any fault on the part of the company. In subsequent litigation it was held that because the suit had been brought as "an action of contract to recover for the loss of furniture," and because the company could establish neither that the bailor had agreed to the move nor that the furniture would also have been burned on the fifth floor, the company was liable without regard to fault.\(^3\) There was admittedly no evidence presented to show that the parties had expressly made storage on the fifth floor an essential term of their agreement. Nor was there anything to show that one location was more dangerous than the other. However, it appeared that the higher location is what the bailor had been told about at the time he brought the furniture in, and the Massachusetts court held that a jury was entitled to find that continued storage according to that expectation was what had been "in the contemplation of the parties" at the time they entered into the bailment contract.\(^4\) Therefore, the jury found a "deviation," and the bailee was held strictly liable.

The same reasoning has been applied in a variety of contests over liability. In one case, a watch repairer entrusted a watch left with him to another repairman for more expert service.\(^5\) A New York court held him liable without fault when the watch was stolen from the other repairman.\(^6\) The court found that the original repairer had been under a contractual duty to inform the owner that the repairs might be carried out off the premises at the time of their original dealings.\(^7\) He had not done so, and consequently was held responsible for the loss, even though he would not have

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\(^3\) Id. at 422.
\(^4\) Id. (quoting Mortimer v. Otto, 99 N.E. 189, 190 (N.Y. 1912)).
\(^6\) Id. at 570.
\(^7\) Id.
been liable had the theft occurred on his premises. In another case, a man in the state of Washington borrowed a car to take others to a railroad station from where they were to catch a train taking them to a funeral. They missed the train at the station, and so the man drove on to their ultimate destination. The car was wrecked through no fault of the driver, and it was held that this deviation, "without any further consent from [the owner] and without his knowledge," was sufficient to allow the car's owner to recover the full value of the wrecked automobile. The question of fault simply did not come into play. In yet another case, a South Dakota farmer contracted for a year's possession of a Percheron stallion to serve as a stud for his mares, agreeing to "take, feed, and care for said stallion." He used the stallion not only as a stud, but also as part of a plough team, claiming that this usage was "for the purpose of giving [the horse] proper and needed exercise." Returning from one such bout of "exercise," the horse died. The court brushed the farmer's excuses aside, holding that if the jury found the farmer "had no right under his contract to use the horse in that manner," he was liable "regardless of any degree of care or diligence." In each of the above cases, failure to live up to a term of the bailment agreement was the reason each court gave for holding a bailee liable without fault. A judge in another such case summarized the principle, stating that "[all the defendant's] trouble arises from failure to carry out his contract."


80. Id. at 830; see also Sperisen v. Heynemann, 308 P.2d 436 (Cal. Ct. App. 1957); Maynard v. James, 146 A. 614 (Conn. 1929); Williams v. Buckler, 264 S.W.2d 279 (Ky. 1954); Truck Leasing Corp. v. Esquire Laundry & Dry Cleaning Co., 252 S.W.2d 108 (Mo. Ct. App. 1952).


82. Id.

83. Id. at 488.

The informality of the contractual terms that are deemed determinative is a particularly striking feature in many of the "deviation" cases. Without any showing of an express, written agreement limiting the ways in which the bailed goods may be kept, triers of fact are required (or invited) to determine the intent of the parties at the time they entered into the bailment. For instance, if a jury decides that "there was a meeting of minds" to the effect that goods would be stored in a particular place because of the address recorded on a storage receipt, or even because the bailee had come to the bailor in response to the latter's classified advertisement listing a particular address, a judgment may follow that the bailee has become liable without fault if the goods are later stolen from or damaged at a different location. In other words, there need be no exact stipulation of location.

There are limits, of course. For a "deviation" to give rise to strict liability, it must have been a material breach of the bailment contract. Not every slight variation will suffice. In addition, the bailor must show that the loss would not have occurred but for the deviation, and if the bailor knows of a settled custom that allows bailees to send the goods to a third party for repair or safekeeping, then no liability attaches. Several recent decisions have gone against bailors on the factual question of whether the bailment contract contemplated the exact place and manner of keeping the goods alleged in the bailor's complaint. And, of course, if the bailor actually agreed to the deviation, no liability will attach for purely accidental loss. The doctrine of "deviation" has not been simply an engine for imposing strict liability on nonnegligent bailees. Overall, however, there are enough cases applying the doctrine in that fashion to show that, in this context, American law remains far from having reached a uniform standard of reasonable care in determining the liability of bailees. Thus, the result in cases where "deviation" could possibly be an issue remains unpredictable.

Among the most important of the "deviation" cases, at least in monetary consequence, have been those involving the liability of an employer for the acts of its employees. The effect of treating the bailment as a contract in these cases is striking. Ordinarily an

89. See Blackford v. Folkerth, 114 N.E.2d 917 (Ohio Ct. App. 1952).
employer is not liable for the acts of its employees when they have acted beyond the scope of their employment. However, as one Pennsylvania court stated the exception, "such [a] doctrine does not apply to the contractual liability of a bailee to the bailor." This has meant, for example, that where an owner has left his car in a parking lot operated by the defendant corporation, and the corporation's employee took the car for a spin, during which time the car was wrecked, the corporation could be held liable for the loss. Liability existed not because of respondeat superior; it was admitted that the employee had acted beyond the scope of his authority. Rather, liability existed because the undertaking to preserve and redeliver inherent in the bailment contract had been violated. Fault became legally irrelevant because the contractual aspect of the bailment controlled the theory of liability.

It should be noted that several cases decided during the last sixty years have reached the opposite result, treating employee deviations as governed by the law of torts, thereby reaching a result consistent with a uniform standard of reasonable care. However, these decisions remain a minority. Most courts have adopted a contract theory of bailments in such cases and have imposed liability on bailee-employers whose employees have deviated from the bailment contract. In principle, it seems quite

90. Restatement (Second) of Agency § 219 (1958).
91. Metzger v. Downtown Garage Corp., 82 A.2d 507, 508 (Pa. Super. Ct. 1951) (emphasis in original); see also Maynard v. James, 146 A. 614, 615 (Conn. 1929) ("This duty of the defendants was contractual in its nature; it required performance . . ."); Bozel & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 75 N.W.2d 366, 371 (Neb. 1956) ("The question here is not that of a defendant's exercise of due care . . . It is a question of defendant's liability for a breach of its admitted contract."); Johnson v. Hanna, 101 N.W.2d 830, 835 (N.D. 1960) ("[T]he liability in such a case grows out of the fact that the bailee has failed to do the thing he agreed to do, rather than, as in tort, out of the theory that the servant is acting for the master.") (quoting 6 Am. Jur. Bailments § 224 (1950)).
93. Id. at 508.
94. Id.
95. See, e.g., Castorina v. Rosen, 49 N.E.2d 521 (N.Y. 1943); New Amsterdam Casualty Co. v. Greenberg, 274 N.Y.S. 854 (N.Y. City Ct. 1934).
96. See Williston, supra note 6, § 1065, at 1021 n.8.
correct to argue that it should make no difference under which theory of bailment a suit is brought when the defendant's employee has caused loss or damage. But in fact it often does.

VI. CONVERSION BY BAILEES

Conversion theory has provided another source of inroads on the uniform standard of reasonable care. In some sense, the results of applying conversion theory follow the "deviation" cases, given that the most extreme form of "deviation" by a bailee is undoubtedly actual conversion of the bailor's property. If a bailee converts the bailed goods, under traditional legal principles the bailor may maintain an action of trover to recover the full value of the goods, and in such situations it may with justice be said that the bailee has acted contrary to his contractual undertaking. However, although there is an inevitable overlap between suing in trover and suing in contract, the theory underlying the two is nonetheless quite distinct. Suing in contract requires a showing of only a failure to preserve and redeliver; nonfeasance on the part of the bailee is sufficient to support this cause of action. Suing in trover, on the other hand, requires misfeasance — a positive act in derogation of the bailor's title or possession. The action lies when the bailee has used the goods in a way that denies the bailor's legitimate property rights in them.

This difference in theory has important consequences in litigation. It means, for example, that conversion can be used to impose liability on a person to whom the original bailee has delivered the goods even though no contract action would lie against those same persons. Similarly, in trover the bailor may recover the full value of the goods and also punitive damages under appropriate circumstances. The latter would not be available if the action were brought on the contract. However, in one significant respect the two are similar: the bailee's liability under both theories is virtually absolute and not defined by a standard of reasonable care. Neither mistake, good faith, nor lack of fault will absolve a bailee who

98. Restatement (Second) of Torts § 222A (1965); 1 Fowler V. Harper et al., The Law of Torts § 2.7 (2d ed. 1986).
100. See, e.g., Dickens v. DeBolt, 602 P.2d 246, 252 (Or. 1979) (police officer held subject to punitive damages for eating a fisherman's sturgeon after seizing it as "evidence" in an unrelated case).
101. See generally 1 Harper et al., supra note 98, § 2.36, at 238 (describing this "special rule of damages" in conversion as the wellspring of its popularity and longevity).
has converted the bailed goods, any more than it will absolve the bailee who fails to perform under a contractual analysis.

Two important questions, however, remain unanswered: (1) what acts by a bailee will amount to conversion? and (2) do these acts represent any substantial breach of the principle that bailees are subject to a uniform standard of reasonable care? If conversion were interpreted to mean what the word implies to the untutored mind — appropriation of the bailed property to the bailee's own use — the answer to the second question would clearly be no. If such were the case, conversion would require actually selling the goods for the bailee's own profit, keeping them despite a demand for redelivery, or similar acts. As a result, the theory behind conversion would impose virtually no higher duty of care upon bailees. Only positively wrongful acts, amounting to a repudiation of the bailment rather than acts of simple negligence, would give rise to liability.

However, this is not what has happened. Conversion, as students of the subject have pointed out,\textsuperscript{102} has acquired a considerably wider meaning in practice. Certainly it has in the many bailment cases decided since 1929 in which, under a wide variety of circumstances, this theory has been used to fasten a strict liability on bailees. For example, many cases involving the unexplained disappearance of bailed goods have been decided under this rubric. In one instance, a bailee to whom a mink coat had been delivered for storage sent the coat to a third party for repair. The New York court held that this act by the bailee itself constituted a conversion of the coat.\textsuperscript{103} When the coat disappeared, the court found that the "failure to return the coat when demanded involve[d] liability regardless of negligence."\textsuperscript{104} In a similar New Jersey case, forty cases of Scotch whisky inexplicably disappeared from a bailee's custody.\textsuperscript{105} Under state law, the bailee was liable for negligent custody only to a small extent of the good's value, but the court held that by showing the disappearance, the plaintiff had "presented a prima facie case of conversion." Accordingly, unless the defendant could show a complete and exonerating

\textsuperscript{102} See, e.g., 2 Thomas A. Street, Foundations of Legal Liability 287 (1906) (treating the action as an act of conversion criticized as "anomalous," "clearly untenable," and "an unconscious reversion to the primitive doctrine which holds the bailee absolutely liable"). See generally William L. Prosser, The Nature of Conversion, 42 Cornell L.Q. 168 (1957).


\textsuperscript{104} Id. at 538.

excuse, it would be liable to the full extent of the loss.\textsuperscript{106}

In many cases involving the sale of bailed chattel by the bailee, a conversion theory has been utilized to impose a higher standard of liability than reasonable care upon bailees. Bailees are often given the power to sell bailed goods either under state law (typically to enforce a statutory warehouseman’s lien) or under the bailment contract itself (to remedy the nonpayment of the bailor’s debt for storage or repair). Most cases hold, however, that unless bailees act in exact compliance with the law in making the sale, they will be treated as converters. Good faith and the reasonableness of their mistake will not protect them. Thus, although a Tennessee finance company may have had a statutory right to sell an automobile when the buyers had not kept up their payments, the company would be treated as a simple converter if that power was exercised “without having regained possession thereof as contemplated by section 7287 of the Code.”\textsuperscript{107} It will not furnish a bailee an effective excuse to argue that they have operated under a mistake of law,\textsuperscript{108} or committed (at most) a technical failure in notifying the bailor of the intended sale,\textsuperscript{109} or even subsequently repurchased the item sold and offered it back to the bailor.\textsuperscript{110} In the eyes of bailment law, they will have committed an act of

\textsuperscript{106} Id. at 1344; see also American Express Field Warehousing Corp. v. First Nat’l Bank, 346 S.W.2d 518 (Ark. 1961); Borg & Powers Furniture Co. v. Reiling, 7 N.W.2d 310 (Minn. 1942); Leavy v. Games Management Serv., 431 N.Y.S.2d 658 (N.Y. Civ. Ct. 1980).


\textsuperscript{108} See, e.g., Newhart v. Pierce, 62 Cal. Rptr. 553, 561 (Cal. Ct. App. 1967) (bailee’s option to purchase cattle invalid for lack of consideration; the court concluding that sale by bailee was conversion since “[a] taking clouded by mistake is no less a wrongful taking”).

\textsuperscript{109} See, e.g., Page v. Allison, 47 P.2d 134 (Okla. 1935). In Page, certain household goods were deposited with a warehouseman. The warehouseman subsequently sold the goods to enforce a lien. Although the depositor of the goods verbally notified the warehouseman of his change of address, the warehouseman instead sent notice of the sale through registered letter addressed to the last recorded address of the depositor. The court held that the depositor’s verbal notice of his change of address was valid, and that the warehouseman, therefore, failed to comply with the applicable statutory notice requirement.

\textsuperscript{110} See, e.g., Williams v. O’Neal Ford, Inc., 668 S.W.2d 545 (Ark. 1984) (punitive damages awarded where bailor refused to accept proffered car in lieu of full payment of its value).
conversion, and from that act will follow absolute liability for the full value of the goods.

Misuse of the bailed item also has frequently produced a judicial finding of conversion by bailees and consequently of absolute liability. For example, in a 1983 New Mexico case, the lessee of an airplane used it to transport marijuana, acting contrary to an agreement that the plane would not be used in violation of the law. After the marijuana had been unloaded, the pilot took off and crashed. When sued for the value of the plane, the lessee sought to avoid liability by establishing that he was in no way at fault for the crash, but that mechanical failure had been the true and proximate cause. However, the court brushed this argument aside, holding that the "unauthorized and injurious use" of the plane was itself an act of conversion, rendering the lessee liable for all losses that had occurred, no matter whose fault they were.

The scope of such "misuse" as a source of conversion turns out to be quite large in the case law. In one decision, a dealer who had sold the plaintiff an automobile recalled it to repair a defect. The plaintiff, who was then delinquent in his payments, brought the car in for repair. Instead of doing the repairs, however, the dealer notified the finance company, which promptly repossessed the car. It was subsequently held that these actions of the dealer constituted not just a dirty trick, but an act of tortious conversion, rendering the dealer liable for the full value of the purchaser's interest in the car, plus punitive damages. In another such illustrative case, a bus was left with the defendant for purposes of storage. The defendant used the bus to transport passengers, admittedly acting contrary to the agreement. He claimed, however,
that he had not materially harmed the bus and had been perfectly willing to return it before trial. The court nonetheless held that use of the bus "to a greater extent than authorized" was a conversion, and that the defendant was liable as a matter of law for the full value of the bus. Misuse of the property by the bailee, therefore, allowed the bailor the choice of recovering the chattel itself or seeking its full value in an action for conversion.

The bailees in these situations did not deny or impeach the title of the bailor, nor did they withhold the goods from the bailor's possession after a lawful demand for their return. Rather, they merely used the property for their own purposes. Traditional bailment law holds, however, that it is for the bailor to say how the property shall be used, and any act by the bailee which presumes to exceed that purpose constitutes an exercise of dominion inconsistent with the rights of the bailor. Conversion requires no more. As a result, bailors may elect either to recover the item (enforcing their property rights as bailor) or sue for the full value of the item in an action for conversion (enforcing their rights as victim of an intentional tort). The fact that the bailee has acted in good faith, or even reasonably under the circumstances, will provide no legal defense. In substance, though not in theory, such cases often seem indistinguishable from the bailment cases involving "deviation" that are treated as breaches of contract. Either theory (or both) can be used to impose an insurer's liability on bailees. This is what has in fact happened in many of the cases decided since 1929.

There have been many difficult cases decided against bailees under a conversion theory. In these cases, the bailee's conduct might easily have been evaluated under a negligence standard, and the result might well have been different had the bailee's liability been defined by a uniform standard of reasonable care. In one such case from the state of Washington, an employee left his

117. See Aetna Casualty & Sur. Co. v. Higben Co., 76 N.E.2d 404, 407 (Ohio Ct. App. 1947); see also Winkler v. Hartford Accident and Indem. Co., 168 A.2d 418, 421 (N.J. Super. Ct. App. Div. 1961) (defendant gave wire band possibly relevant in a tort action to another insurance company; held that this "disposition of the wire without authority would constitute a breach of the bailment agreement and a conversion"); Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 266 N.Y.S.2d 785, 799 (N.Y. App. Div. 1965) ("unauthorized transfer of bailed property, for whatever purpose even for a temporary period, is a conversion"); Presley v. Cooper, 284 S.W.2d 138, 140-41 (Tex. 1955) (sale of two mares to reduce bailor's debt held to be "in direct violation of the express terms of the contract of bailment . . . and the intent to convert will be conclusively presumed").
luggage in his employer's office before flying to Alaska.\textsuperscript{118} It was not clear which party had been the more careless, but the bags were sent to the wrong destination and one was eventually lost. When the employee sued for the value of the lost bag and its contents, the court avoided the question of negligence entirely, holding instead that the employer was liable for the value of the bag and its contents "on the theory that the conduct of [the employer] amounted to a conversion."\textsuperscript{119} In a conceptually similar case from South Carolina, a car that had been left in the custody of a dealer for repair suffered interior damage from being left outside.\textsuperscript{120} The court held the dealer liable for the entire value of the car as well as for punitive damages because of the parties' original agreement that contemplated storage for just a few weeks. In fact, the defendant had kept the car for a few months.\textsuperscript{121} According to the court, the defendant's conduct "may not constitute a conversion of the plaintiff's property in the completely literal sense" but, in contemplation of the law, it amounted to an act of conversion all the same.\textsuperscript{122}

These cases, and others like them, illustrate the potential consequences inherent in analyzing a bailee's conduct in terms of the law of conversion.\textsuperscript{123} If a bailee's conduct can be brought within the compass of conversion theory, bailors will gain the advantage of a more reliable theory of liability and a larger measure of recovery. Liability will be strict, and the necessity of finding a specific act of negligence or the possibility of dilution by comparative fault will be eliminated. Difficult questions of causation will be avoided entirely because bailees will be liable even when there has been a supervening proximate cause of the loss. As we shall see, conversion theory will often also make an end run around

\textsuperscript{118} Walling v. S. Birch & Sons Constr. Co., 213 P.2d 478 (Wash. 1950).
\textsuperscript{119} \textit{Id.} at 480.
\textsuperscript{120} Harris v. Burnside, 199 S.E.2d 65 (S.C. 1973).
\textsuperscript{121} \textit{Id.} at 67.
\textsuperscript{122} \textit{Id.} at 68.
\textsuperscript{123} See Chatterton v. Boone, 185 P.2d 610, 612 (Cal. Ct. App. 1947) (mistake about whether building in which fire had occurred could safely be entered makes bailee liable for value of household goods because "mere good faith of the bailee in refusing to deliver the goods to the owner, upon demand, is no defense to the action of trover"); Baena Bros., Inc. v. Welge, 207 A.2d 749, 751 (Conn. Cir. Ct. 1964) (defendant, entrusted with sofa for "slimming" of the arms and reupholstery, held liable for full value of sofa when he "slimmed" the arms to a greater extent than contemplated "thereby altering the style of the furniture from colonial to modern"); Star Fruit Co. v. Eagle Lake Growers, Inc., 33 So. 2d 858 (Fla. 1948) (bailee, who accepted tangerines for grading, packing and shipping, but dumped them after an embargo rendered them unfit for shipping, held liable for conversion).
It is often said, and correctly, that not every negligent act on the part of bailees constitutes an act of conversion. But there is an overlap between acts constituting negligence and those legally amounting to conversion. Where that overlap exists, American courts have often used the latter theory in ways that limit the success of the uniform standard of reasonable care.

VII. MISDELIVERY BY THE BAILEE

Misdelivery is the one exception to the uniform standard of reasonable care customarily mentioned in casebooks and hornbooks. Occasionally, the mention is coupled with the suggestion that the exception, because it constitutes an anomaly in the law, ought to be eliminated in favor of a uniform standard of reasonable care. The question is not whether this would be a good idea. Rather, the question here is how misdelivery theory has been used in the cases decided by American courts during the past sixty years, and whether the theory retains enough vitality to present a serious obstacle to the achievement of a uniform rule of negligence-based liability. It turns out that it does. The misdelivery exception is far from dead.

There have, it is true, been cases in which misdelivery has been treated under the rubric of negligence. In them, a bailee’s liability for delivering bailed goods to someone other than the owner has been judged by a standard of ordinary care; when the bailee acted reasonably, no liability was attached. However, the number of such cases has been small, and none seems to have rejected the misdelivery exception outright. Indeed, most have not directly confronted the question of what the standard for a bailee’s liability should be. Rather, they have simply assumed that the case involved a negligence standard. The suggestion that the misdelivery exception should be eliminated from the law of bailments as a matter

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124. See infra pp. 35-36 and note 162.
125. See supra notes 4-5, 9 and accompanying text.
126. See Tremaroli v. Delta Airlines, 458 N.Y.S.2d 159 (N.Y. City Civ. Ct. 1983) (liability for baggage that disappeared during airport security check discussed largely in terms of negligence); Laurens v. Jenny’s, Inc., 66 N.E.2d 777 (Ohio Ct. App. 1945) (where delivery was made to United Parcel Service contrary to bailor’s instructions, liability imposed only for negligence and, therefore, limited to a stated amount by agreement of the parties); Maitlen v. Hazen, 113 P.2d 1008, 1013 (Wash. 1941) (“The liability of respondents, if any, is a tort liability, and they are liable only in the event they failed to use slight care, or at most such care as a reasonably prudent person would have used, under all the circumstances.”).
of legal policy seems, therefore, not to have penetrated very far into the case law.

When there has been express consideration of bailment theory in such cases, misdelivery frequently has been treated under either (or both) of the two theories just discussed. That is, judges have described misdelivery either as “itself an act of conversion,” or as “a departure from the terms of the bailment contract,” thus rendering the bailee’s liability virtually absolute. The “classic” difficult cases of misdelivery have involved honest and innocent mistakes by bailees. Usually, losses have been caused by an imposter who secured delivery by forging a claim check, or by falsely assuming the identity of the bailor’s employee. Occasionally, bailees have been deceived about the identity of the true owner of the goods when the goods were originally received, or when delivery was made to a third party through accident or dishonesty on the part of a stranger to the bailment. In the cases decided during the past sixty years, American courts have often held that “a delivery to an unauthorized person is as much a conversion as would be a sale of the property.” The exercise of due care has constituted no defense even for a gratuitous bailee.

127. Hall v. Boston & Worcester R.R., 96 Mass. (14 Allen) 439, 443 (1867) (“A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence.”); see also Treadwell Ford, Inc. v. Wallace, 271 So. 2d 505, 510 (Ala. Civ. App. 1973) (“[C]onversion can be accomplished where there is a wrongful delivery of personal property by a bailee resulting in its loss to the true owner.”).
128. Potomac Ins. Co. v. Nickson, 231 P. 445, 447 (Utah 1924). The court stated that, “[i]n a case like the one at bar, all that the bailor is required to show is that the bailee has breached his contract by delivering the subject of the bailment to another without the consent of the bailor.” Id. at 448. See also Jacobson v. Belplaza Corp., 80 F. Supp. 917, 919 (S.D.N.Y. 1948) (“Wrongful delivery was a breach of its contract.”).
130. Baer v. Slater, 158 N.E. 328 (Mass. 1927) (bailee delivered bailed goods to imposter wearing the cap, badge, and shirt of company to which bailor had directed bailee to deliver); see also Fremont Nat’l Bank & Trust Co. v. Collateral Control Corp., 724 F.2d 1410 (8th Cir. 1983); David Crystal, Inc. v. Cunard Steam-Ship Co., 339 F.2d 295 (2d Cir. 1964); Motors Ins. Corp. v. Union Mkt. Garage, 207 S.W.2d 836 (Mo. Ct. App. 1948); Turner v. Scobey Moving & Storage Co., 515 S.W.2d 253 (Tex. 1974).
131. Fisher v. Pickwick Hotel, Inc., 108 P.2d 1001 (Cal. App. Dep't Super. Ct. 1940) (bailee delivered bailed goods to person who had driven automobile into hotel's lot, but did not require production of the claim check, which was in possession of the car's true owner).
133. Central Meat Mkt., 62 S.W.2d at 89.
134. Id. at 89-90; see also S/M Indus., Inc., v. Hapag-Lloyd A.G., 586 So. 2d 876, 883 (Ala. 1991) (“In such a case neither a sincere or apparently well-founded belief that the delivery to an unauthorized person was right nor the exercise of any degree of care constitutes a defense even to a gratuitous bailee.”).
Cases that actually extend the misdelivery exception are even more troubling to the view that strict liability for misdelivery is anomalous. These cases have broadened the definition of misdelivery to encompass only roughly analogous conduct and have thereby moved further away from a uniform standard of negligence-based liability. For example, in a 1963 Tennessee case, a guest left her car in the hotel’s parking lot at the time she registered. In litigation that first attracted the attention and then the intervention of the Tennessee Hotel Association, the supreme court held that the defendant hotel had committed “an act quite analogous to misdelivery” by permitting its bell boy to have access to the car. Therefore, the hotel was held liable for the full value of the automobile. The court stated explicitly that, in analyzing a bailee’s conduct, “the law will not inquire whether it did so in good faith or through negligence or otherwise.” Such cases show that the rule of absolute liability for misdelivery lives, and indeed may actually be growing stronger in the recent decisional law.

This unhappy conclusion is likely a correct one overall, but a survey of the cases also suggests that, in two particular respects, the law of bailment and misdelivery may actually have moved slightly closer to a negligence standard of liability. First, as noted

136. 373 S.W.2d at 910.
137. Id.
138. Id.
139. See Wheelock Bros., Inc. v. Bankers’ Warehouse Co., 171 P.2d 405, 408 (Colo. 1946) (bailee “bound, at his peril in case he delivers the property to one other than the bailor”); Terminal Transp. Co. v. Burger Chef Sys., Inc., 211 S.E.2d 788 (Ga. Ct. App. 1974) (liability imposed on carrier for storing goods with a third party after the party to whom they were to be delivered refused to pay for them); Sullivan & O’Brien, Inc. v. Kennedy, 25 N.E.2d 267 (Ind. Ct. App. 1940) (delivery to father who paid balance due for repair of son’s car renders bailee liable for conversion without regard to fault or wrongful intent); Lipman v. Petersen, 375 P.2d 19 (Kan. 1978) (holding release of wrenches to former owner without proper authorization to constitute act of conversion); Breckinridge County v. Gannaway, 47 S.W.2d 934, 937 (Ky. 1932) (county officer who deposited funds in bank instead of turning them over to county treasurer, “thereby assumed all the risk resultant from such departure from his duty as imposed by the statute”); D.A. Schulte, Inc. v. North Terminal Garage Co., 197 N.E. 16, 18 (Mass. 1935) (truck was stored in defendant’s garage and removed by unknown persons while defendant’s employees watched “renders the defendant liable for a misdelivery of the truck”); Dolezal v. Cleveland, Canton & Columbus Motor Freight Co., 2 Ohio Op. 423, 427 (Cleveland Mun. Ct. 1935) (delivery to authorized agent who refused to pay cash-on-delivery charges treated as misdelivery).
above, in many cases judges have treated misdelivery either as one form of negligence or as closely associated with it, but without giving any real consideration to the underlying legal theory. Second, in cases in which there has been a dispute over the ownership of bailed goods, nonnegligent bailees have sometimes escaped liability even though they had delivered those goods to the person who later turned out not to be the true owner. In both instances, however, courts have failed to expressly recognize that they were departing from a misdelivery exception. For those who look for conceptual coherence in the law, the results in this area have been far from satisfactory.

The first of these results is readily apparent to anyone reading a significant number of bailment cases. One notices quickly how often misdelivery is factually linked with negligence. For example, in a 1972 Texas case, a restaurant patron left behind her pocketbook, which was subsequently turned over to the management by a busboy.¹⁴⁰ But when the patron returned to claim it the next day, her pocketbook was gone; it had been handed over to a stranger. In subsequent litigation, the patron alleged that the management’s actions amounted to negligent delivery and asserted that the restaurant owner was consequently liable for the value of the pocketbook and its contents.¹⁴¹ The court agreed. Restating the first result, both the parties and the courts treat misdelivery as being presumptively negligent; misdelivery is itself the act of negligence.¹⁴² In some of the cases, it appears that both misdelivery and negligence have been present,¹⁴³ such that liability is established no matter what the underlying theory may be. However, decisions do not always make their rationales clear. Indeed, some seem almost purposefully to paper over the distinction between misdelivery and negligence.¹⁴⁴ Of course, judges are not obliged to

¹⁴¹ Id. at 153.
¹⁴² Id. (misdelivery was negligence); see also Saddler v. National Bank, 85 N.E.2d 733 (Ill. 1949) (misdelivery creates presumption of negligence); Smith v. Crickmore, 39 N.Y.S.2d 261, 262 (N.Y. City Ct. 1942) (presumption of “misdelivery or wrongful disposal which constitutes gross negligence”); Rensch v. Riddle’s Diamonds, 393 N.W.2d 269, 273 (S.D. 1986) (rejecting the possibility of “innocent misdelivery” as mitigating factor).
¹⁴³ E.g., Jacobson v. Richards & Hassen Enters., Inc., 172 F.2d 464 (2d Cir. 1949) (both rationales employed); Capezzaro v. Winfrey, 379 A.2d 493 (N.J. Super. Ct. App. Div. 1977) (release by police of money to robbery suspect who was declared incompetent to stand trial treated as both negligence and misdelivery); Clark v. Tabers, 54 S.W.2d 262 (Tex. Civ. App. 1932) (delivery to nonemployee in plaintiff’s store found to be both misdelivery and negligence).
¹⁴⁴ See, e.g., Gebert v. Yank, 218 Cal. Rptr. 585 (Cal. Ct. App. 1985) (inconsistencies between misdelivery and negligence theories apparently ignored); Zayenda v. Spain & Spain,
choose. No one requires them to satisfy the desires for conceptual clarity of the writers of law review articles. When judges are themselves unclear, uncertain, or uncaring, those writers can then only point this out, recognizing the conceptual ambiguities and the possibilities for further litigation that inevitably follow.

The second area of movement towards a negligence standard for misdelivery has been in the difficult situation created by disputes over the bailor's ultimate title to the goods. Bailees are faced with more than a conceptual dilemma here: to whom should they deliver the bailed goods — the original bailor or the claimant with paramount title? According to traditional law, when a third party asserts a claim to the goods and communicates this to the bailee, the bailee will be liable to this party in conversion for redelivering the goods to the original bailor if it turns out that the claim is well founded. On the other hand, if the bailee makes delivery to this third party instead and it later turns out that the original bailor is in fact the true owner, the bailee will be liable to the bailor in conversion. In choosing to whom to make their delivery, bailees act at their peril.

Over the past sixty years, no decision has explicitly adopted a negligence standard when fixing the liability of misdelivering bailees in these circumstances, but a few have come close. Courts have held that unless bailees have good and full notice of a claim of paramount title, their delivery of the goods back to the original bailor will be excused. Other courts have also excused bailees if they refuse to deliver the goods to anyone at all until the title has been made clear to them. In theory, bailees are liable in conversion if they refuse to return the goods to the owner. When, however, there is reasonable doubt as to who the true owner actually is, bailees have been excused if they have withheld the goods. To this extent, the case law over the past sixty years has edged a little closer to a uniform standard of reasonable care in misdelivery cases.

145. See Brown, supra note 4, § 11.7, at 285.
146. See, e.g., Ardisco Fin. Corp. v. de Margoulies, 250 N.Y.S.2d 77, 81 (N.Y. App. Div. 1964) (stress[ing that any other rule would lead to "serious practical difficulties in the business world and interfere unnecessarily with normal commercial intercourse"]).
147. See, e.g., Hildegarde, Inc. v. Wright, 70 N.W.2d 257, 260 (Minn. 1955) ("But where the refusal is qualified, and such qualification upon delivery has a reasonable purpose, the bailee is not a converter.")
It must be admitted, however, that these two areas do not represent a terribly large inroad in the traditional rule. Neither area is numerically large enough to eclipse the traditional rule that absolute liability ensues when a bailee delivers the goods to someone other than the bailor. Absolute liability for misdelivery, therefore, may seem to be a conceptual anomaly. But it remains the law applied in most of the American cases.

VIII. LIMITATIONS ON THE LIABILITY OF BAILLEES

Bailors, particularly professional bailees, often attempt to limit the scope of their liability by inserting terms into bailment agreements that either exclude liability altogether or limit it to a fixed (and usually low) dollar amount. In addition, they lobby legislatures for the adoption of statutes limiting their potential liability — statutes which they later invoke. Disputes arising from these attempted limitations have created one of the liveliest, or at least the most crowded, areas of litigation involving bailees' liability that has existed during the past sixty years. This area of litigation most likely ranks second in volume only to litigation involving the allocation of the burden of proof. The questions here involve whether the theory of bailment adopted in the cases has played a significant role in deciding these cases, and to what extent the adopted theories have conflicted with the uniform standard of reasonable care.

There is of course no necessary incompatibility between any conception of bailment and limiting the extent of a bailee's liability for negligence. Within some limits, parties can contract freely regarding the extent of their tort liability to each other. Therefore, the results in much of the litigation concerning limitations on liability would have been the same regardless of the bailment theory adopted. However, an examination of the cases reveals that courts have used each of the theories of bailment liability previously discussed to fasten strict liability upon bailees. These courts have dealt with limitations of liability in ways that would not have been possible under ordinary negligence law. This too has limited the success of a uniform standard of reasonable care in bailment cases.

As a preliminary matter, the reluctance of courts to enforce terms limiting liability for negligence is universally acknowledged and deserves mention. The strength of that reluctance is the most salient and obvious lesson to be drawn from the case law, and may be a motivating factor in all of the cases described below.\textsuperscript{148}

\textsuperscript{148} See, e.g., Dresser Indus. v. Foss Launch & Tug Co., 560 P.2d 393, 396 (Alaska
There are numerous reasons given for refusing to enforce limitations on liability. Some American courts have imposed liability despite the existence of exculpatory contractual provisions by finding that the term was not sufficiently brought to the attention of the bailors and therefore was not part of the actual bailment contract. Others have reached the same result simply by reading the terms strictly against the bailees who drafted them. In addition, some courts have treated the document embodying the bailor's disclaimer simply as a form of identification, not as a contract, thereby effectively disregarding the exculpatory provisions. Moreover, others have invoked a public policy rationale to fasten liability upon negligent bailees, holding the clauses limiting their liability legally invalid. Finally, still others have avoided the effect of these clauses on grounds that frankly seem incoherent.

Most American courts, however, will enforce such limitations on liability unless the limitations are wholly unreasonable. Particularly when bailees specify a dollar limit on their liability and offer bailors the chance to secure a higher valuation on the bailed goods by paying a premium, bailees stand a fair chance of avoiding liability for the full value of the goods if the goods are lost or damaged. Indeed, bailees may be better off in the end by setting a reasonable fixed liability than by attempting to exclude responsibility altogether. The question here, however, is whether the underlying theory of bailment adopted in the case law has made any difference in jurisdictions where such limitations would otherwise be enforceable. An examination of the cases shows that it has.

First, a contractual understanding of bailments has been used to invalidate otherwise valid limitations on liability in cases in

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154. See Restatement of Contracts § 574 (1932); 8 Am. Jur. 2d Bailments § 142 (1980).
155. See Brown, supra note 4, § 11.5, at 273.
which the bailees themselves have failed to live up to their undertaking. Paradoxically, contract theory has also been used to exclude enforcement of the terms of the contract because, when bailees "deviate" from the terms of the original contract, it seems logically inconsistent to some courts to permit them to invoke the same contract as a means of escaping full liability. Thus, for example, where a storage company moved a fur coat from one storage location to another under circumstances in which the transfer was contrary to the original agreement of the parties, the bailee was not permitted to rely on the agreed valuation of $200 contained in the original bailment agreement. Rather, the bailee was liable for the full $7600 value of the coat. Failure to comply with the contract's essential terms, the court held, in effect estopped the bailee from invoking the protection for which he had contracted. As one judge put it, a bailee "cannot deliberately breach a provision of a contract and rely upon another provision of the contract in an action against him for such breach." Misdelivery cases make the same point. In a 1972 Texas case, a woman left her purse in a hotel dining room. The purse was delivered to the cashier, who mistakenly gave it to a stranger. Texas had a statute limiting liability for misdelivery to $50, and the hotel owners sought to shelter themselves behind this statute. They had no luck. The court held that, because the misdelivery was the result of the bailee's negligence, "such limiting statute is not applicable under the circumstances of this case." The difference in theory led to a difference in result. It may be true that a simple failure to redeliver bailed goods to the bailor will not itself be treated as misdelivery for purposes of imposing liability on the bailee; but when violation of the bailment contract through "deviation" or misdelivery can be shown, attempts to take advantage of statutes or contract terms limiting the bailee's liability have generally failed.

159. Id. at 153.
160. See C.A. Articulos Nacionales de Goma Gomaven v. M/V Aragua, 756 F.2d 1156, 1160 (5th Cir. 1985).
161. See Wabco Trade Co. v. S.S. Inger Skou, 482 F. Supp. 444 (S.D.N.Y. 1979);
In bailment cases involving attempts to limit liability, the doctrine of conversion has served much the same purpose and has allowed American courts to reach the same result. Indeed, it has sometimes overlapped with a contractual analysis of the problem. The basic theory behind imposing full liability for conversion despite attempts to limit liability is simple and convincing: bailees who purposely destroy or wrongfully sell goods in their possession should not be able to invoke a term in the bailment contract to limit their liability. In such circumstances, bailees will have committed an intentional act entirely inconsistent with their undertaking as a bailee, and it would be unjust to allow them to pay less than the full value of the goods in consequence. Indeed, to allow anything less would tempt bailees to convert the goods whenever they had been undervalued in the original bailment contract.\textsuperscript{162}

However, the cases invoking conversion theory to exclude limitations on liability have not been restricted to these situations. Rather, they have extended the liability of bailees where no purposeful conversion could be shown and where no evidence of actual repudiation of the bailment could be said to exist under any fair recital of the facts. The most difficult cases have been those in which the proximate cause of the damage or disappearance of the bailed goods was unknown. In these cases, the question has been whether a clause limiting the bailee's liability should be effective, and the outcome has very often seemed to turn on whether the underlying theory of the case was framed in terms of negligence or of conversion. Where conversion theory has been used, the bailees' attempts to limit the extent of their liability have failed.

The leading recent case, decided under the Uniform Commercial Code (U.C.C.) provisions regulating warehousemen, is the 1980 New York decision of \textit{I.C.C. Metals, Inc. v. Municipal Warehouse Co.}\textsuperscript{163} In \textit{I.C.C. Metals}, a trader delivered three lots of industrial metal to the defendant warehouseman for storage. When the trader demanded its return three years later, the metal could not be found. The defendant argued that it must have been stolen, though this was in fact no more than a reasonable speculation on the defendant's part. Litigation ensued because the warehouse receipt


\textsuperscript{163} 409 N.E.2d 849 (N.Y. 1980).
limited defendant's liability to $50. The defendant was quite willing to admit negligence because, under New York law and the U.C.C., its liability for negligence would have been limited to the nominal $50. The New York Court of Appeals, however, held that the plaintiff was entitled to summary judgment and recovery to the full extent of the loss. The court concluded that, unless the bailee could produce "adequate evidentiary proof in admissible form to support its suggested explanation" for the loss, the law would conclusively presume that it had converted the metal.\footnote{Id. at 856.}

There has been both doubt and contention about the wisdom of this result. The case contains a strong dissent, which argues that the outcome should not have turned on whether the action was brought in conversion or negligence.\footnote{Id. at 856-58. The dissenter was Judge Jasen. The vote, however, was six to one against his position.} The dissenting judge pointed out that conversion ordinarily requires a showing of some affirmative act on the bailee's part. No such fact was present in the case. The dissenting judge further argued that the majority's opinion allowed bailors to secure more protection against loss than they had paid for.\footnote{Id.} These are not inconsiderable arguments, and not every case decided since \textit{I.C.C. Metals} has followed its lead.\footnote{See, e.g., \textit{International Nickel Co. v. Trammel Crow Distrib. Corp.}, 803 F.2d 150 (5th Cir. 1986); \textit{Refrigeration Sales Co. v. Mitchell-Jackson}, Inc., 770 F.2d 98 (7th Cir. 1985); \textit{Western Mining Corp. v. Standard Terminals}, Inc., 577 F. Supp. 847 (W.D. Pa. 1984).} However, several have.\footnote{E.g., \textit{National Resources Trading, Inc. v. Trans Freight Lines}, 766 F.2d 65 (2d Cir. 1985); \textit{Philipp Bros. Metal Corp. v. S.S. Rio Iguazu}, 658 F.2d 30 (2d Cir. 1981) (applying maritime law); \textit{Joseph H. Reinfeld, Inc. v. Griswold & Wateman Warehouse Co.}, 458 A.2d 1341 (N.J. Super. Ct. Law Div. 1983); \textit{Art Masters Assocs., Ltd. v. United Parcel Serv.}, 549 N.Y.S.2d 495 (N.Y. App. Div. 1989); \textit{RGA Indus. Inc. v. Jomas Express Inc.}, 499 N.Y.S.2d 28 (N.Y. App. Div. 1986); \textit{Employers Ins. v. Chemical Bank}, 459 N.Y.S.2d 238 (N.Y. Civ. Ct. 1983).} Sophisticated commentators seem likewise inclined towards the case's result.\footnote{See \textit{WHITE & SUMMERS}, supra note 15, § 21-3, at 145-46.} Whatever the merits, the case demonstrates, as do so many of the other recent decisions on this subject, just how far the current decisional law stands from a consensus in favor of a negligence-based liability for bailees. Surveying the lot, a uniform standard of reasonable care seems as elusive as ever.

IX. CONCLUSION

This examination of the American cases decided since 1929 has demonstrated the continued persistence of contract and conversion
theories of liability in bailment cases. The property-based definition of bailments articulated by Williston and so widely approved in the scholarly literature has not wholly supplanted the older conceptions of bailments. This examination has also illustrated the continuing importance of contract and conversion theories in preventing implementation of a uniform standard of reasonable care as the invariable rule of bailment liability. Only in the area of allocating the burden of proof has substantial progress been made towards treating all bailment cases alike. In other areas, absolute liability often has been fastened upon bailees who have in no way repudiated the bailment relationship. Bailees have many times been denied the chance to prove that their conduct was reasonable. Different understandings of the nature of bailments have made determinative differences in the outcomes of cases.

A critical observer might say that the result in many of the cases surveyed depended on an arbitrary choice of which bailment theory the deciding court chose to emphasize. That observer would doubtless be struck by the wide range of options available to judges and litigants. It may be said that the courts could have reached the results they did without the theories of conversion and contractual undertaking, but the fact is that they have used these theories and have done so apparently in order to oust the negligence standard. From this observation, it appears but a short step to the conclusion that the case law continues to be governed by "the anachronism, confusion, and basic unfairness of traditional doctrine."\textsuperscript{170}

A less critical observer might respond that the evidence merely shows that bailments continue to stand at the intersection of property, contracts, and tort.\textsuperscript{171} This critic might note, as has one perceptive foreign observer, that a bailment has always been "a somewhat labyrinthine concept" in the law\textsuperscript{172} and he might also ask why things should be any different today. Perhaps resignation in the face of a fact of legal life is called for. A few observers — proponents of the status quo — might even contend that the current situation is a sign that the law is responding to society's needs. According to such observers, conceptual coherence may be a theoretically desirable goal, but not one that should come ahead of justice in result. Put another way, they might be thinking that the variety of available theories allows courts, in the very different sorts of cases that come before them, to reach fairer results than

\textsuperscript{170} See Bailment Liability, supra note 2, at 2121 n.6.
\textsuperscript{171} See Bailor Beware, supra note 12, at 129-30.
would one uniform standard of liability. There may, of course, be something to these arguments. They are impossible to disprove, though even their proponents could scarcely deny that the lack of uniformity in the case law encourages uncertainty regarding the rights of bailors and bailees and consequently increases litigation.

For those of us who hope for greater uniformity and doctrinal coherence in the law, the bailment cases decided since 1929 nevertheless furnish an instructive example of the limits and requirements of suggestions for law reform. We must take account of the dynamics of litigation in making these suggestions. If we do not, the suggestions will too often fall upon stony ground. If a culprit for the present situation is required, the accusing finger can only be pointed at the dynamics of ordinary litigation; it has prevented achievement of a uniform standard of bailment liability. The undeniable existence of precedents supporting various theories of bailment, the clear self-interest to parties in litigation of making use of those precedents, the comparative infrequency of appellate litigation about each of the bailment problems surveyed, the absence in each particular case of a clear perception of the need for overall doctrinal uniformity, and the inevitable limitations in time and knowledge among those who make the case law, taken all together, have combined to frustrate the achievement of a uniform standard of negligence liability.

Only on the question of how to allocate the burden of proof, can it be said that real progress has occurred during the last sixty years. In that area, the relative frequency of the question in litigation, the obviousness of the anomaly in result, and the immediate inconvenience to judges have led to a happier outcome. In the other areas of bailment law surveyed, the limitations have been more prominent, and without statutory amendment, they seem very likely to be permanent. The dynamics of case law development will doubtlessly continue to dominate the development of this corner of our law. The full lesson of the failure of the uniform standard of bailee liability must therefore include a frank recognition of the importance of these dynamics. If we wish to make changes in the law, we must show not only why they are desirable, we must show how they will actually be achieved.