I. INTRODUCTION

1. Meaning and Classification

(1) Meaning of "bailment"

HBL-1 Accepted definition. A bailment is a legal relationship that arises upon delivery of personal chattels in trust on the understanding that the chattels shall be returned, in either their original or an agreed upon altered form, as soon as the time for which they were bailed has elapsed or the condition for which they were bailed has been performed. A bailment arises when one person (the bailee) is voluntarily in possession of goods belonging to another (the bailor) upon an undertaking to keep and return the same. Contract not required. A bailment relationship is commonly based upon the terms of an express or implied contract between bailor and bailee, but a bailment can be established in the absence of a valid contract. Privity of contract between the parties is not required; where the bailee transfers the goods to a sub-bailee with knowledge of the bailor's interest, a bailment relationship exists between the bailor and the sub-bailee. A finding that a bailment is contractual is significant only to the extent that it affects the remedies to which a party may be entitled either for breach of the agreement's terms or to enforce compliance.

Nature of trust relationship. A bailee may commonly be referred to as a "trustee" for the bailor; this is not necessarily an improper characterization. However, though it may be said bailed chattels are held "in trust", when used in this context, the expression does not have the same technical meaning as when used in connection with real property. In particular, a bailee is not a "trustee" within the meaning of provincial legislation governing trust relationships: the bailee is held to no equitable fiduciary obligations; no cestui que trust is present; and the bailee's sole duty is to hold the bailed property safely until its return is demanded.

HBL-2 Cause of action. A cause of action in bailment arises when the bailee defaults in his or her responsibility to return the goods to the bailor. Generally speaking, a claim arising out of a bailment relationship will be characterized as either a contract claim or a negligence claim, as the bailment relationship contains elements of both contract and tort. The choice of proceedings is determined by the substance of the claim itself, not by the circumstances, contractual or otherwise, that give rise to the bailment.
I. INTRODUCTION

2. Bailment Distinguished from Other Relationships

(1) Licence

HBL-10 Licence defined. A licence is in effect a grant of authority by the licensor to allow the licensee to enter upon its land for an agreed purpose, justifying what would otherwise be a trespass. The legal effect of the relationship is that the licensor is precluded from bringing an action for trespass against the licensee until it revokes the licence. The central distinction between a licence and a bailment is that the former, absent a special contractual provision, carries no obligation on the part of the licensor toward the licensee with respect to any chattel subject to the licence.

Nature of the relationship. To determine whether an exchange is a bailment or a licence, the relationship between the parties must be considered. The most crucial factor in determining whether a bailment is established is a transfer of possession to the bailee by means of access or control. One indicium that the transfer has taken place is evidence that the bailee has taken steps to safeguard his or her exclusive possession of the chattels during the bailment period. By contrast, a finding that possession has been transferred is less likely where a property owner gives explicit instructions that his or her property not be touched or where a car park proprietor provides vehicle owners with a ticket indicating vehicles are left on the premises at the owner's risk.

Onus of proof. In a bailment suit, once the bailor proves non-delivery of the bailed goods, the onus shifts to the bailee to prove the loss was not his or her fault or that he or she could rely on the terms of an exemption clause in the bailment contract. No such additional onus falls on a licensor, who must only demonstrate that it has honoured the existence of the licence for its duration.

HBL-11 Agency defined.

HBL-11 Agency defined. An agency relationship has three primary features: an agent performs a service for its principal; an agent represents its principal to others; and an agent can affect its principal's legal position by acquiring rights and incurring liabilities. The only common feature between agency and bailment is the provision of a service. A bailee does not represent the bailor; it merely exercises certain powers of the bailor with respect to the bailor's property. A bailee has no power to make contracts on a bailor's behalf, nor can the bailor be held liable for the bailee's actions.

Possessory title. A bailee receives possessory title to the bailor's property by virtue of his or her relationship with the latter. Once possession is transferred, the bailee stands in the place of the owner and retains possessory title until the bailment is terminated. By contrast, an agent's right to possession on behalf of its principal does not provide the agent with possessory title as the principal retains overall control of the property.
2. Bailment Distinguished from Other Relationships

(3) Sale of Goods

HBL-12 Passage of title. The essential difference between a bailment and a sale is whether title passes from one party to another. In a bailment, the bailor retains the right to claim redelivery of property deposited in trust in the same or an altered form and title to the property does not pass. Where property is instead delivered in exchange for an equivalent sum of money or other valuable commodity, a vendor and purchaser relationship is created and title to the property passes from the former to the latter. A seller who retains possession of the buyer's goods following purchase becomes a bailee for reward of those goods until the time by which the buyer has expressly or impliedly agreed to take delivery of the goods. After such time expires, a seller in possession of the same goods becomes a gratuitous bailee. In either case, the seller's obligation is to exercise reasonable care and diligence with respect to the goods.  

Mixing of chattels. In a traditional bailment, where a delivered chattel is to be returned in the same or an altered form, the title does not pass to the recipient. However, where the transaction as made by the contract between the parties does not require the party receiving the chattel to return it in its original or an altered form but permits the possessor to return another chattel of equal value or to pay the equivalent monetary value, there is no bailment, as a vendor and purchaser relationship is created and title in the chattel passes to the recipient. Such an arrangement is common where the consumable goods of multiple parties are intermixed in storage; however, the rule only applies where it is clear under the terms of the agreement that the party in receipt of the goods has the right to dispose of them as he or she sees fit; where the goods are stored separately, such that they may be returned to the owner, a bailment arises. Where the deposit contract stipulates that the bailee is to arrange for insurance for the goods, this may be evidence of a bailment relationship, whether the cost of insurance is borne by the bailor or the bailee.

Footnote(s)


4 Crawford v. Kingston, [1952] O.J. No. 457, [1952] O.R. 714 (Ont. C.A.) (defendant to raise cows on behalf of brother-in-law for three years, then return cows to him; agreement required return of a certain number of cows, but defendant had right to buy and sell cattle in interim); Re Delta Smelting & Refining Co., [1988] B.C.J. No. 2532, 33 B.C.L.R. (2d) 383 (B.C.S.C.) (smelter in business of refining and storing precious metals; during refining pro-
cess, material from various customers pooled together; final product indistinguishable as to
source).

5 *Busse v. Edmonton Grain & Hay Co.*, [1932] A.J. No. 42 at para. 14, [1932] 1 D.L.R. 744 (Alta. C.A.) (grain elevator operator storing grain for multiple farmers; clear that grain was not put into consumable stock; defendant bound to deliver it or equivalent in quantity and quality at any time); *Coro (Canada) Inc. (Trustee of) v. Enthone-OMI (Canada) Inc.*, [1997] O.J. No. 4704 at para. 26, 36 O.R. (3d) 563 (Ont. Gen. Div.) (bailee's use of gold limited to plating process and bailee had to account for its use; no right conferred to deal with the gold in trade or as a pledge); see also **HBL-42** ("Warehouse Receipts").
