“A RULE ADUMBRATED”: BAILMENT ON TERMS AND THE RULE OF LAW

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I. Introduction

Law, not discretion, decides cases. Deciding cases according to rules of law promotes certainty and consistency in decision making because like cases are treated alike. This benefits society. Equality before the law, lower transaction costs and so on are trite observations.[1] However, if two rules function to resolve a single dispute, we encounter the problem of duplication.[2] Where there is a duplication the description of the event that gives rise to those rules is elevated into a reason for distinguishing them. That is a problem because it is not a rational distinction. It is to resolve cases according to the language spoken.[3] Like cases would not be treated alike.

This article argues first that “bailment on terms”, a rule that binds consenting but non-contracting parties to terms where there is a bailment, cannot be rationally distinguished from the law of contract because it rests on the same justificatory principle for a cause of action, consent, and contract already functions to resolve those disputes. The rule is irrationally distinguished by the language spoken. It is a duplication contrary to the rule of law.

The rule is a duplication because the reasons for the rule cannot place it within the existing conceptual law framework independent of, or in exception to, contract. Therefore, the reason for it to function must be that it is unique to an independent conceptual category, the law of bailments. Formally categorising the rule answers the empirical question about where it fits within the framework. However, the language spoken, “bailments”, does not rationally distinguish the rule from contract to overcome duplication. It still rests on the same justificatory principle for a cause of action as there is an absence of independent, substantive reasoning identifying a distinct function the rule fulfils where there is a bailment.

Despite the irrational distinction, consent is a sound justificatory principle to bind someone to terms.[4] Injustice could be avoided in consensual but non-contractual relationships while maintaining the rule of law because the rule in bailments would be certain, taking priority over

[1] E. Ryder, ‘Justice in Crisis’ (2022) 138 L.Q.R. 259; J. Allison (ed.), *The Law of the Constitution* (Oxford: Oxford University Press, 2013) at pp.97-115; T. Bingham, *The Rule of Law* (London: Penguin, 2010); K. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington: Brookings Institution Press, 2006); P. Birks, “Equity in the Modern Law: An Exercise in Taxonomy” [1996] U.W. Austl. L. Rev. 1; J. Raz, “The Rule of Law and its Virtue” (1977) 93 L.Q.R. 195

[2] E. Sherwin, “Legal Taxonomy” (2009) 15 LEG. 25 at 49-50; S. Worthington, *Equity* (Oxford: Oxford University Press, 2006) at pt.1 ch.1; A. Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, (Oxford: Bloomsbury, 1998) at pp.20-1, 23; Birks, “Equity in the Modern Law: An Exercise in Taxonomy” [1996] U.W. Austl. L. Rev. 1 at 7, 50; P. Atiyah, “Medical Malpractice and the Contract/Tort Boundary” (1986) 49 Law & Contemp. Probs. 287 at 288-89

[3] P. Birks, *The Roman Law of Obligations*, (Oxford: Oxford University Press, 2014) at pp.1-2; Birks, “Equity in the Modern Law: An Exercise in Taxonomy” [1996] U.W. Austl. L. Rev. 1 at 3ff, 50

[4] R. Barnett, “A Consent Theory of Contract” (1986) Colum. L. Rev. 269; C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (London: Harvard University Press, 1981) at p.35; M. Cohen, “The Basis of Contract” (1933) 4 Harv. L. Rev. 553

contract. The precedent it sets becomes an independent, authoritative reason to follow it.[5] Therefore, it would be possible to conclude that contractual rules could or should be re-considered that appear to be underinclusive relative to its substantive purpose, making the rule redundant. However, this is not an article on the general redundancy of bailments nor when consent should be binding.[6] This is a rule of law argument, and the rule is contrary to the rule of law for a second reason. If the rule rests on the same justificatory principle as contract, functioning to bind consenting parties to terms, it is only the language spoken, 'bailments', that distinguishes the rule from contract. Therefore, bailments is a labile concept because its descriptive terms can be manoeuvred whenever a court thinks justice demands consent to terms should be binding. That is a discretion, not law.

The exercise of a discretion to bind consenting but non-contracting parties to terms means there is good reason for denying any injustice caused if the rule is not followed. If the rule is a duplication, a court that chooses to speak the language of bailments may foist contractual liability onto the parties. If the parties did not intend to be bound the duplicative rule will redistribute the risk they did consent to in contract, undermining their individual liberty. In turn, foisting personal rights onto the parties can reorder established legal rules, such as in secured credit transactions. Finally, it will erode the rule of law at a principled level. Parties cannot be certain which language the court will speak, making it harder to plan their affairs and there will be no equality before the law. The bailments judge cannot say non-contracting parties are bound while the contract judge says they are not.

II. Legal Taxonomy as an Analytical Framework

The rule of law requires like cases to be treated alike. However, the rule of law is not "treat all cases the same". Cases can be distinguished but the reasons to do so must be rationally defensible.[7] If two rules function to resolve one dispute there is a duplication contrary to the rule of law. Both rules would rest on the same justificatory principle for an action and the language spoken is not a rationally defensible reason for distinguishing the cases.

For example, imagine your football team has a goal disallowed for offside. In your team's next match, a goal is scored against you from an offside position. The goal is allowed to count because the referee decides the situation is governed by a different rule, 'unfair advantage'. Your team would be incensed at the lack of consistency and rightly so. Like cases have not been treated alike because both rules function to resolve the same dispute and the language spoken is not a rational reason for distinguishing the cases: offside or unfair advantage.

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[5] *The "Winkfield"* [1902] P. 42 at 55; [1900-03] All E.R. 346; S. Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 889

[6] P. Atiyah, *Essays on Contract*, (Oxford: Oxford University Press, 1986) at p.380; Fried, *Contract as Promise* (1981); P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) at pp.764-770 (consent); G. McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22; G. McMeel, 'The Redundancy of Bailment' [2003] L.M.C.L.Q. 169 (redundancy)

[7] Worthington, *Equity*, (2006) at pt.1 ch.1 – "Like situations must be treated alike; different situations must be treated differently, and, crucially, in *rationally different* ways" and "like situations must be treated alike, and different situations must be treated in *defensibly different* ways"; see also, Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 882-84, 891-92; A. Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2011) at pp.25-6; P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 473

If we would not tolerate duplication in our favourite sport, we should not tolerate it in our legal system.[8] Now consider bailment on terms. Bailments is a voluntary assumption of responsibility for another's property.[9] A and B will be in a bailment relationship where B has been bailed A's property, as will sub-bailees 'C'. The terms B/C perform on will be binding on A where either A consented to performance on those terms,[10] or to the extent A and B agree the terms of the contract intend to benefit C.[11] This rule is known as "[sub-]bailment on terms", hereinafter, "the rule". The rule functions to determine whether the terms B/C performed on will be binding on A and appears to be a duplication of the law of contract, where consensual but gratuitous promises are not binding for want of consideration.[12] Like cases will not have been treated alike if the rule rests on the same justificatory principle for a cause of action in contract, consent, but is irrationally distinguished based on the language spoken: bailments or contract.

Legal taxonomy literature is used as a framework to analyse whether the reasons for the rule can rationally distinguish it from contract. Only by careful categorisation can like cases be treated alike.[13] Categorisation requires all the legal rules to be formally accounted for and there is no duplication.[14] Legal categories can be separated into conceptual and contextual categories of law. Conceptual categories are generic conceptions of events, or a cause of action, that may give rise to rights recognised in law.[15] Contextual categories bring together all the law on a particular topic. The formal rules of conceptual categories are the "tools" that function to determine the outcome of a dispute.[16] Categorising rules according to function means disputes that fall within the same category are treated alike because the legal rules of that category function to respond to those disputes.[17] Disputes that fall into independent categories can be rationally distinguished because the rules of each function to resolve different disputes.[18] If a single dispute counts twice within the categories there is a duplication,

[8] For a similar analogy see, Worthington, *Equity*, (2006) at pt.1 ch.1
[9] *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] UKHL 12; [2003] 1 Lloyd's Rep. 571 at [135]-[136]; *The Pioneer Container* [1994] 2 A.C. 324 at 336-39; [1994] 2 All E.R. 250 at 256-59; *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 W.L.R. 1262 at 1268; [1970] 3 All E.R. 825 at 831; N. Palmer, *Palmer on Bailment*, 3rd edn (London: Sweet & Maxwell, 2009) at para.1-001
[10] Between A and B see, *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522; (1924) 18 Ll. L. Rep. 319; *Carver on Bills of Lading*, 4th edn (London: Sweet & Maxwell, 2017) at para.7-101; between A and C see, *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 at 729; [1965] 2 All E.R. 725 at 733-34
[11] *The Mahkutai* [1996] A.C. 650 at 667-68; [1996] 3 All E.R. 502 at 514-15
[12] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847; *Tweddle v Atkinson* (1861) 1 B&S 393; 121 E.R. 762
[13] Burrows, *Understanding the Law of Obligations* (1998) at p.16; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 17
[14] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 33; P. Birks, "Unjust Enrichment and Wrongful Enrichment" [2001] Tex. L. Rev. 1767 at 1769, 1780-81; P. Birks, *The Classification of Obligations*, (Oxford: Clarendon Press, 1997) at p.14
[15] McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22 at 23; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 19; *cf*. G. Samuel, "English Private Law: Old and New Thinking in the Taxonomy Debate" (2004) 24(2) O.J.L.S. 335; A. Burrows, "Contract, tort and restitution – a satisfactory division or not" (1983) 99 L.Q.R. 217
[16] *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111 at 116; [1984] 3 All E.R. 982 at 987; McMeel, "The Redundancy of Bailment" [2003] L.M.C.L.Q. 169 at 176-77
[17] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 34-6, 39-40, 52-53
[18] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 34-6, 47; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 19

the "conundrum of disorderly categories",[19] because there are two rules that function to resolve it distinguished only by the language spoken.

This means that whether the rule can be rationally distinguished from contract depends on whether bailments is a conceptual or contextual category of law.[20] If bailments is a contextual category of law, it would bring together all the law on voluntary assumptions of responsibility for another's property and conceptual rules apply to it.[21] To rationally distinguish the rule from contract, it would have to be categorised according to the function of an independent conceptual category or as exceptional to the conceptual rules. Otherwise, there will be a duplication. There would be two rules functioning to resolve one dispute about consent to contractual terms, distinguished only by the language spoken. If bailments is a conceptual category of law, its rules are independent of other conceptual categories. Formal categorisation alone is not enough to rationally distinguish the rule from contract to justify its function with the rule of law. There would still be a duplication as the rule would continue to rest on the same justificatory principle for a cause of action in contract, distinguished by the language spoken. To overcome duplication, there must be substantive reasons for recognising rights in bailments that identify a distinct function its rules fulfil from other categories,[22] such as how tort and fiduciary liability can be distinguished.[23]

III. Bailment on Terms: "A Rule Adumbrated"

To analyse whether the rule has been rationally distinguished from contract within that analytical framework, first the reasons for the rule must be identified. Those reasons were established by Lord Denning in *Morris v CW Martin & Sons Ltd* and referred to in *Midlands Silicones Ltd v Scruttons Ltd*.[24] The reasoning was subsequently clarified by Lord Goff in *The Pioneer Container*[25] and extended in *The Mahkutai*.[26]

In *Morris*, the bailor contracted with the bailee to have their coat cleaned. Later they agreed that the work would be sub-contracted. The sub-contractor's employee stole the coat. The sub-contractor was liable for converting the coat to their own use because the employee had been acting in the course of employment when they stole the coat.[27] The exclusion clause in the sub-contractor's contract did not cover the loss.[28] Nonetheless, in obiter, Lord Denning held that the clause was binding on the bailor because there had been a bailment on terms.

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[19] Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 5-6; Birks, "Unjust Enrichment and Wrongful Enrichment" [2001] Tex. L. Rev. 1767 at 1780-81; see also, Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 27

[20] McMeel, "The Redundancy of Bailment" [2003] L.M.C.L.Q. 169 at 175-76

[21] McMeel, "The Redundancy of Bailment" [2003] L.M.C.L.Q. 169 at 175-76; P. Birks, "Restitution and the Freedom of Contract" (1983) 36 C.L.P. 141 at 146

[22] See, for example, Burrows, *The Law of Restitution* (2011) 4; Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' [1996] U.W. Austl. L. Rev. 1 at 17

[23] *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 16-7; [1996] 4 All E.R. 698 at 710-11; citing *Permanent Building Society v Wheeler* (1994) 14 A.C.S.R. 109 at 158; see also, Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' [1996] U.W. Austl. L. Rev. 1 at 50

[24] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716; *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446; [1962] 1 All E.R. 1; see also, G. Treitel, *Some Landmarks of Twentieth Century Contract Law*, (Oxford: Oxford University Press, 2002) at p.76

[25] [1994] A.C. 324

[26] [1996] A.C. 650

[27] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 at 726, 728, 732-7, 740

[28] [1966] 1 Q.B. 716 at 730

The reasons he gave for the rule are repeated in full to illuminate why it was described as "a rule adumbrated":[29]

> "Can the defendants rely, as against the plaintiff, on the exempting conditions although there was no contract directly between them and her? … As long ago as 1601 Lord Coke advised a bailee to stipulate specially that he would not be responsible for theft, see Southcote's case, a case of theft by a servant. It would be strange if his stipulation was of no avail to him. The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise. Suppose the owner of goods lets them out on hire, and the hirer sends them for repair, and the repairer holds them for a lien. The owner is bound by the lien because he impliedly consented to the repairs being done, since they were reasonably incidental to use of the car: See Tappenden v Artus. So also if the owner of a ship accepts goods for carriage on a bill of lading containing exempting conditions (i.e., a "bailment upon terms") the owner of the goods (although not a party to the contract) is bound by those conditions if he impliedly consented to them as being in "the known and contemplated form," see the words of Lord Sumner in Elder, Dempster & Co v Paterson Zochonis & Co Ltd, which were regarded by Dixon CJ and Fullagar J as stating the ratio decidendi, see Wilson v Darling Island Stevedoring & Literage Co Ltd with whose judgment Viscount Simonds entirely agreed in Midland Silicones Ltd v Scruttons Ltd and also the cases to which I referred in that case."[30]

Three reasons for the rule to function can be identified from that quote. The first is its doctrinal foundation: consent.[31] In *Scruttons*, Lord Denning supported this consensual model for the rule by reasoning bailments is a "branch of the law of property"[32] and drew an analogy with the common law lien as authoritative support in both cases.[33] This consent, he said, extended to bind subsequent purchasers.[34] In *The Mahkutai*, Lord Goff extended the consensual model to protect sub-bailees to the extent the terms agreed between bailor and bailee intended to benefit the sub-bailee.[35] The second reason was *Elder, Dempster* was precedent for the rule. Finally, he reasoned it would be "strange" if the exemption would be of no avail to a sub-bailee. This appears to assert that an exception should be made in the context of bailments.

Lord Goff clarified Lord Denning's reasoning in *The Pioneer Container*. He held bailments liability arises on a voluntary assumption of responsibility for another's property and its rules

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[29] *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The "Captain Gregos") (No 2)* [1990] 2 Lloyd's Rep. 395 at 405

[30] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 at 729-30; citing *Southcote's Case* (1601) 4 Co. Rep. 83b; Cro. Eliz. 815; *Tappenden v Artus* [1964] 2 Q.B. 185; [1963] 3 All E.R. 213; *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep. 346; *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446

[31] Alternative doctrinal foundations for the rule are, *The Pioneer Container* [1994] A.C. 324 at 339 (authorisation); *Evans v Soule* (1813) 2 M&S 1; 105 E.R. 283 (notice); N. Palmer, 'Sub-bailment on terms' [1988] L.M.C.L.Q. 466 at 469; S. Baughen, 'Bailment's Continuing Role in Cargo-Claims' [1999] L.M.C.L.Q. 393 (attornment); *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215; Atiyah, *The Rise and Fall of Freedom of Contract* (1979) at p.177 (benefit and burden); *Carver on Bills of Lading* (2017) at para.7-102 (tort)

[32] *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 489; citing P. Winfield, *The Province of the Law of Tort*, (Cambridge: Cambridge University Press, 1931) at p.100

[33] In *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 729-30; citing *Tappenden v Artus* [1964] 2 Q.B. 185; and in *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 490; citing *Jowitt & Sons v Union Cold Storage Co* [1913] 3 K.B. 1

[34] *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 490; citing *Jowitt & Sons v Union Cold Storage Co* [1913] 3 K.B. 1; *cf. Carver on Bills of Lading* (2017) at para.7-101

[35] *The Mahkutai* [1996] A.C. 650 at 667-68

are not dependent on the law of contract.[36] Therefore, the bailor's consent authorised the bailee to regulate the bailment relationship between the bailor and sub-bailee.[37] The judgment made no reference to the law of property. He concluded that to recognise bailments and the rule as independent was "principled and just".[38]

IV. Bailments as a Contextual Category of Law: Alignment or Exception?

It falls first to consider whether the reasons for the rule can justify its function with the rule of law where bailments is a contextual category. This section argues there is no alignment with the rules of the law of property, no precedent, and no rationally defensible reason for an exception to be made to the conceptual rules.

1. Bailments, the law of property and the common law lien

Recall that formal categorisation of rules requires all rules to be accounted for within the conceptual framework. For the rule's function to be justified with the rule of law, formal rules of an existing conceptual category of law must allow it to function in the way it does. Otherwise, the rule is a duplication of contract, distinguished based on the language spoken.

Since the rule does not require consideration for the bailee's promise, the rule cannot be formally categorised as part of the law of contract.[39] Instead, Lord Denning reasoned the bailor's consent bound them as third-party because bailments is part of the law of property, supported by an analogy with the common law lien. A hallmark of a property right is its ability to bind third parties. That is what the rule does. If the rule is functioning to resolve a dispute about a property right, as opposed to consent to terms, the reasoning can rationally distinguish bailments from contract. To do that, the formal rules of the law of property must be capable of recognising terms of a contract as a property right where there is a bailment, otherwise there is a duplication. The label 'bailments' cannot be used to treat a dispute about consent to contractual terms as a property right where there is a bailment but not otherwise.

It is not possible to rationally distinguish the rule from contract by categorising the rule as a property right. It would be paradoxical to conclude otherwise. If bailments is "a branch of the law of property", its rules must be applied in this context. Lord Denning's reason that consent binds third parties to terms because bailments is part of the law of property is something the law of property explicitly says cannot be done.[40] There is a closed list of property rights a

[36] *The Pioneer Container* [1994] 2 A.C. 324 at 336-42; see also, *East West Corp v D.K.B.S. 1912* [2003] EWCA Civ 83; [2003] Q.B. 1509 at [26], [69]
[37] [1994] 2 A.C. 324 at 339
[38] [1994] 2 A.C. 324 at 338-39, 342
[39] Nor does it align with other contractual rules: *Sandeman Corpimar v Transitos Y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] Q.B. 1270 (collateral contracts); *The Pioneer Container* [1994] 2 A.C. 324 at 339; *cf.* M Bridge, *Personal Property Law*, 4th edn (Oxford: Oxford Clarendon Press, 2015) at pp.66-7 (estoppel and implied contract); *Sonicare International Ltd v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep. 48 at 52 (agency); *The Pioneer Container* [1994] 2 A.C. 324 at 340-42; *Astley v Seddon (No 2)* (1876) 1 Ex. D. 469; *cf. Johnson Matthey* [1976] 2 Lloyd's Rep. 215 (benefit and burden)
[40] For a similar point, see W Swadling, "The Proprietary Effect of a Hire of Goods", in N Palmer and E McKendrick (eds), *Interests in Goods,* 2nd edn (London: LLP Reference Publishing, 1998) at p.516

person can create.[41] Personal terms of a contract are not admitted to that list.[42] Furthermore, it is not possible to privately consent to create new types of property rights because to do so "would lead to the creation of an infinite variety of interests in land [or chattel], and an indefinite increase of possible estates".[43] Therefore, if consent is the basis for the rule, then it cannot be part of the law of property because its rules would not permit it. If, however, it is part of the law of property then consent cannot be the reason for the rule because it would not bind third parties.

Nonetheless, the law of property can be developed incrementally by analogy. As Lord Denning held, if a lien is a bailment and it is possible for a lien to be binding on a consenting third party,[44] then it should be possible for contractual terms of a bailment to be binding on a consenting third party. However, the analogy is pitched at a level of generality to be unspecific and should be denied as a valid incremental development of the law.

"Legal categories are… generalisations designed to support analogical decision-making within the class they define."[45] While a lien and contractual terms are both based on consent, we have not moved to a discretionary system as to whether consent is binding. The rights created by consent to a lien and consent to contractual terms fall into independent categories. A lien is a property right.[46] It is binding on third parties via the operation of law, subject to adverse claims irrespective of consent.[47] Consent may not bind the third party to a lien if the lienee's possession of the property is not lawful,[48] such as where the lien exceeds the bailor's own rights in relation to the property[49] or the property is subject to a prior security interest.[50] Contractual terms, however, are a personal right to which only contracting parties are bound to by consent.[51] The analogy with consent elides these distinctions that matter and the lien, as a property right, cannot be used to support analogical decision making in the distinct category of personal rights.[52] To rule otherwise would be a duplication. Contractual terms do

[41] *King v David Allen (Billposting) Ltd* [1916] 2 A.C. 54, H.L.; *Hill v Tupper* (1863) 2 H&C 121; 159 E.R. 51; *cf. National Provincial Bank v Ainsworth* [1965] A.C. 1175, H.L.; [1965] 2 All E.R. 472
[42] *Cf. Lord Strathcona Steamship Co v Dominion Coal Co* [1926] A.C. 108; (1925) 23 Ll. L. Rep. 145; *De Mattos v Gibson* (1858) 4 De. G. & J. 276; 70 E.R. 669; A. Clarke, 'De Mattos v Gibson Again' [1992] L.M.C.L.Q. 448
[43] *Hill v Tupper* (1863) 2 H&C 121 at 128
[44] *Tappenden v Artus* [1964] 2 Q.B. 185 at 198; *Jowitt & Sons v Union Cold Storage Co* [1913] 3 K.B. 1 at 10; *Albermarle Supply Co Ltd v Hind and Co* [1928] 1 K.B. 307
[45] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 43
[46] *Tappenden v Artus* [1964] 2 Q.B. 185 at 195; *Clark's Case* (1588) 2 Leo. 30; 74 E.R. 333; P. Watts & F. Reynolds, *Bowstead and Reynolds on Agency*, 21st edn (London: Sweet & Maxwell, 2018) at paras.5-104, 7-084; M. Bridge *et al*, *The Law of Personal Property*, 2nd edn (London: Sweet & Maxwell, 2017) para.30-136
[47] *Santiren Shipping Ltd v Unimarine SA (The "Chrysovalandou Dyo")* [1981] 1 All E.R. 340 at 347-48; [1981] 1 Lloyd's Rep. 159 at 165; *Tappenden v Artus* [1964] 2 Q.B. 185 at 195
[48] *Re Oasis Hong Kong Airlines Ltd* [2011] 2 H.K.L.R.D. 471 at [9]; *Tappenden v Artus* [1964] 2 QB 185 at 195-96; *Bowmaker Ltd v Wycombe Motors Ltd* [1946] K.B. 505 at 509; [1946] 2 All E.R. 113 at 115
[49] *Withers LLP v Langbar International Ltd* [2011] EWCA Civ 1419; [2012] 2 All E.R. 616 at [53]; *Eide UK Ltd v Lowndes Lambert Group Ltd* [1999] Q.B. 199 at 213; [1998] 1 All E.R. 946 at 956
[50] Bridge *et al*, *The Law of Personal Property* (2017) at paras.30-136; citing *Joseph v Lyons* (1884) 15 Q.B.D. 280; *Mercantile Credits Ltd v Jarden Morgan Australia Ltd* [1991] 1 Qd. R. 407 at 424
[51] Swadling, 'Property: General Principles', in A Burrows (ed.), *Oxford Principles of English Law Private Law* (2013) at para.4.17
[52] Other examples of conflation include, *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd* [1988] 4 H.K.C. 377 at 391; *Lukoil-Kalingradmorneft plc v Tata Ltd* [1999] 1 Lloyd's Rep. 365 at 375; *Sonicare International Ltd v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep. 48 at 53-4; *The Pioneer Container* [1994] A.C. 324 at 339; *Carver on Bills of Lading* (2017) at para.7-104; R.

not bind third parties as a property right where the obligation is purely personal, nor do they attach to a transfer of property in non-bailment relationships.[53] The language spoken, 'bailments', would not be a rational reason for why contractual terms are a property right where there is one but are a personal right where there is not.

2. Elder, Dempster as precedent for the rule

If the rule does not align with the conceptual rules, its function may be justified with the rule of law due to the precedent it sets becoming an independent, authoritative reason for following it in the context of bailments.[54] Lord Denning held *Elder, Dempster* was precedent for the rule, as confirmed in *Wilson*, which the House of Lords agreed with in *Scruttons*.[55]

In *Elder, Dempster*, the shipper contracted with the charterer who chartered a ship with the shipowner for the carriage of the shipper's cargo. The shipper was bound to the clause excluding liability for the obligation to make the ship seaworthy against both the charterer and shipowner. As against the shipowner, different explanations have been given for why the shipper was bound but none have been conclusive.[56] Lord Sumner held that it "may be" bailments, stating that if the bill of lading was in its known and contemplated form, the bailor is taken to have impliedly consented to it.[57]

A case is only precedent for what it "actually decides"[58] and a ratio is a "ruling that settles a point of law…necessary as justification for the decision reached".[59] Casuistic reasoning may have been a feature of early legal systems, but it is threadbare support for a rule that sweeps away established conceptual rules in a particular context. As such, while Viscount Simonds thought *Elder, Dempster* "largely" turned on bailments,[60] neither *Scruttons* nor *Wilson* held that the ratio of *Elder, Dempster* was bailment on terms. Both held that all *Elder, Dempster* decided was that "the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading".[61] Furthermore, both imply that they would have been slow to accept the rule. Viscount Simonds held that an exception to privity would be a matter for parliament,[62] while

Kilpatrick, Privity and sub-contracting in multimodal transport: Diverging solutions [2019] 7 J.B.L. 481 at 484-93

[53] See, for example, *Secure Capital v Credit Suisse* [2017] EWCA Civ 1486; [2017] 2 Lloyd's Rep. 599 at [10]; *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446; *Donoghue v Stevenson* [1932] A.C. 562; 1932 S.C. (H.L.) 31

[54] *The "Winkfield"* [1902] P. 42 at 55; Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 889

[55] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 at 729-30; *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 487; see also, *The Pioneer Container* [1994] A.C. 324 at 339-40

[56] See, for example, *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] 1 Lloyd's Rep. 571 at [135]; *The Mahkutai* [1996] A.C. 650 at 660-61; *The Pioneer Container* [1994] A.C. 324, 339-40; *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 468, 479; Law Commission Report, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242 Cm 3329 July 1996) at para.2.20; F. Rose, Return to Elder Dempster? (1975) 4 *Anglo-American Law Review* 7

[57] *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] A.C. 522 at 564-65

[58] *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 469

[59] N. MacCormick, 'Why Cases have Rationes and What These Are' in L Goldstein (ed.), *Precedent in Law* (Oxford: Clarendon Press, 1988) at p.170

[60] *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 470

[61] [1962] A.C. 446 at 470; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep. 346 at 364

[62] [1962] A.C. 446 at 471

Fullagar J saw no reason why an owner could not avoid their contract by framing their action in tort against a third party.[63] *Elder, Dempster* is not precedent for the rule.

A counter argument to this conclusion is that in the absence of any other ratio, it must have been bailments. That discounts the possibility the precedent it sets is bad law. A ratio must be "plainly deducible".[64] Such a ratio is not so deducible because the rule functions contrary to what the conceptual rules of property and contract demand. Following it would erode the rule of law because "bailments", as the next section argues, is not a rationally defensible reason to treat them exceptionally to contract or property rules.

3. The rule as an exception to the formal conceptual rules

Lord Denning's reason that it would be "strange" if the terms were of no avail offers no rationally defensible reason to make an exception to either the rules of contract or property in this context because it does not confine it to bailments.

Consent is a rational reason to bind the bailor to terms. To not do so may cause injustice. If A has agreed with B to a bailment on terms to C, it may be unfair for A to deny those terms as against C who otherwise will find themselves liable to a greater extent than they agreed with B. However, the general primacy of the formal rules should be maintained in legal contexts to preserve the rule of law even if those rules produce an outcome that might be perceived as substantively unjust.[65] Formal rules may be under or over inclusive relative to their substantive objectives[66] but they serve as an independent, authoritative, and mandatory reason for making decisions.[67] The substance of the law is a different question to its authority and existence.[68] If the substance of rules generally prevailed over its form in determining the outcome of disputes, the "hortatory purpose" of law would be eroded.[69] A court that uses substantive reasons to determine a dispute contrary to what the formal rules demand might achieve justice in the

[63] *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep. 346 at 357-58, 360

[64] *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 469; citing *Quinn v Leathem* [1901] A.C. 495 at 506

[65] J. Sumption, Letters, (2022) 44(3) *London Review of Books*; Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 878-79, 891-94, 898; Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 468-71, 476; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 16-18; P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (New York: Oxford Clarendon Press, 1987) at pp.2, 25; Fried, *Contract as Promise* (1981) at pp.84-5

[66] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 39; Atiyah and Summers, *Form and Substance in Anglo-American Law* (1987) at p.13

[67] Atiyah and Summers, *Form and Substance in Anglo-American Law* (1987) at pp.7-11; see also, Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 879; Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195

[68] R. Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998) at pp.33-43; Raz, "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195 at 196; J. Austin, *The Province of Jurisprudence Determined*, W Rumble (ed.) (Birmingham, Legal Classics Library, 1832 [Cambridge University Press, 1995]) at p.157

[69] P. Atiyah, *From Principles to Pragmatism* (Oxford: Clarendon Press, 1978); P. Atiyah, *Pragmatism and Theory in English Law*, (London: Stevens, 1987) at p.126 – "hortatory purposes" or "function" of the law is to not just resolve disputes between parties but to set down rules to guide the conduct of parties in the future

individual case but it provides sparse guidance for future parties and decision makers, eroding the rule of law.[70] "Nothing could be taken for granted."[71]

Primacy of the formal rule over its substance can be inferred from the limited use of the Practice Statement.[72] A concrete example is the plight of Robert Hazeldean, a cyclist who collided with a pedestrian crossing the road while looking at their mobile phone. He was ordered to pay compensation to the pedestrian under the Law Reform (Contributory Negligence) Act 1945.[73] Substantively the law was not designed for parties in a symmetrical, uninsured position.[74] Nonetheless, the formal rule held that Robert Hazeldean was liable. It was a formal, authoritative outcome but, arguably, not a substantively just one.[75]

Nonetheless, we cannot be dogmatic about legal certainty.[76] Nobody reasonably argues anymore that the common law is settled in accordance with "natural law", merely "discovered and declared" by judges.[77] The law does and must develop and cases are distinguished.[78] Therefore, while the court is in a position to prioritise its imperative, the rule of law,[79] it does have other imperatives to consider when resolving disputes, such as justice.[80] Formalism can only be taken so far if we are also to achieve justice. Exceptions may be made as to how the formal rules apply to like cases in different contexts but to maintain observance of the rule of law, the substantive reasons for doing so must be rationally defensible.[81]

It is argued that for an exception to be rationally defensible to justify its function with the rule of law, the substantive reasons for it must confine it to the context it arises in. If the reasoning can be applied to other contexts, the language spoken would not be a rational reason to not

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[70] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 879, 881-82, 885, 896; Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 469, 471

[71] J. Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, and Financial Trade Law*, 6th edn (Portland: Hart Publishing, 2016) at p.167

[72] Practice Statement (Judicial Precedent) [1996] 1 W.L.R. 1234

[73] *Brushett v Hazeldean (unreported) https://www.lawgazette.co.uk/commentary-and-opinion/cyclists-costs-bill-sparks-sympathy/5070878.article* accessed 26th Jan 2022

[74] J. Steele, "Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort", in T.T. Arvind and J. Steele (ed.), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2012) at pp.159-184

[75] Steele, 'Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort', in Arvind and Steele (ed.), *Tort Law and the Legislature* (2012) at p.160

[76] Ryder, "Justice in Crisis" (2022) 138 L.Q.R. 259 at 260; Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 884; Lord Mance, "Should the law be certain" The Oxford Shrieval lecture, 11th October 2011, *https://www.supremecourt.uk/docs/speech_111011.pdf* accessed 11th April 2022; Dworkin, *Law's Empire* (1998) at p.88; O. Holmes, 'The Path of the Law' (1897) 10 Harv. L. Rev. 457 at 464

[77] For early recognition see, *Re Hallet's Estate* (1880) 13 Ch. D 696; see also, Ryder, "Justice in Crisis" (2022) 138 L.Q.R. 259 at 264; H. Maine, *Ancient Law* (London: John Murray, 1917) at pp.24-26

[78] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349 at 377-79; [1998] 4 All E.R. 513 at 534-57; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 5; Raz, 'The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195

[79] D. Gibbs-Kneller, D. Whayman, D. Gindis, "Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms" (2022) 23(3) E.B.O.R. 573 at 583

[80] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 876; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 5; B. Markesinis, "An expanding tort law – the price of a rigid contract law" (1987) 103 L.Q.R. 354 at 380, 388-89; J Rawls, *A Theory of Justice* (Massachusetts: Harvard University Press, 1971) at p.311

[81] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 885-86; Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 473

count the exception as the general rule.[82] It would be a duplication. Precisely when reasoning does rationally confine an exception to a context does not need to be resolved here,[83] but a straightforward example is how *contra proferentem* is confined to contexts where one party is vulnerable to another i.e. consumer law and trusts.[84] In contrast, broad appeals to substantive notions such as "justice" are not rationally defensible reasons for an exception to be made because they do not confine it to the context it arises in.[85] For example, "commercial convenience" is not a rationally defensible reason for making an exception to personal property law in the context of negotiable instruments when it could equally apply to a buyer who has paid for unascertained goods.[86] "Justice" is not a rationally defensible reason to allow recovery of expectation interest by third-party putative beneficiaries of a will from a negligently performed contract in distinction to third parties in other contexts who had not been allowed to recover.[87] Likewise, a person who had used a company to perpetuate a fraud, "public policy" was "no justification" for holding that person liable, as third party, for the contractual obligations of the company.[88] Therefore, while consent may be a rational reason to bind parties to terms and following the rule may avoid injustice, to avoid duplication there must be a rational substantive reason for making an exception in the context of bailments to the formal rules of contract or property that would otherwise not bind a third party.

That it would be "strange" if terms were of "no avail" to a third party is not a rational reason for making an exception because there would be no reason for it not to count as the general rule. It would be true of all contexts. That is evident in the circularity of the reasoning. It is not strange, it is the law. Terms are not binding on third parties, either personally or as a property

[82] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 886; J. Stapleton, "Duty of care: peripheral parties and alternative opportunities for protection" (1995) 111 L.Q.R. 301 at 326
[83] For an example of the difficulty in doing so *cf. Hurstwood Properties Ltd v Rossendale Borough Council* [2021] UKSC 16; [2022] A.C. 690 at [63]-[76]; and *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 A.C. 415
[84] *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373; [2017] 2 C.L.C. 28 at [52]; see also, D. Gibbs-Kneller and D. Whayman, "How contractual terms determine fiduciary duties: a two-stage process" (2019) 70(2) N.I.L.Q. 241 at 256-57
[85] A. Marmor, "Should Like Cases Be Treated Alike" (2005) 11 LEG. 27 at 29
[86] *Jenkyns v Usborne* (1844) 7 M&G 678; 135 E.R. 273; *cf. Picker v London and County Banking Co* (1887) 18 Q.B.D. 515; J. Ewart, "Negotiability and Estoppel" (1900) 16 L.Q.R. 135 at 152-53
[87] *White v Jones* [1995] 2 A.C. 207; [1995] 1 All E.R. 691 *per* Lord Mustill; S. Smith, "Rights, remedies and normal expectations in tort and contract" (1997) 113 L.Q.R. 426 at 430; Stapleton, "Duty of care: peripheral parties and alternative opportunities for protection" (1995) 111 L.Q.R. 301 at 324-26; B. Markesinis and S. Deakin, "The Randomness of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from Anns to Murphy" (1992) 55 M.L.R. 619
[88] *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 A.C. 337 at [139]; *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep. 313 at [91]-[92]; overruling *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333; [2012] 1 All E.R. (Comm) 293 at [27]

right.[89] Nonetheless, contract,[90] equity,[91] tort,[92] and statutory[93] solutions allow non-contracting parties to "avail" themselves on terms against each other. These solutions are not universal and contain gaps.[94] Believing these gaps produce a "strange" outcome takes us back to where we began. It is not strange, it is the law.

Lord Denning cited Lord Coke's judgment in *Southcote's Case*. The bailee's servant had stolen the goods but the claim was made in detinue by the bailor against the bailee. Lord Coke held that if a bailee takes goods in a "special manner", such as "at the peril" of the bailor, he will not be answerable for them.[95] While contractual terms or structure that a person consents to, or has notice of, can be a factor in determining whether a third party is liable in tort to that person,[96] the decision tells us nothing about whether a non-contracting but consenting party would be bound by such terms. The case was decided in 1601 when privity was in its "formative period".[97] Contracts were seen as reciprocal but the modern doctrine not yet settled. There is nothing in Lord Coke's judgment to suggest he held consent to terms, exonerating terms or otherwise,[98] would have bound a non-contracting party in exception to the modern contractual or property doctrines. In the absence of any rational reason to confine the rule as exceptional to the context of bailments, it remains a duplication, distinguished by the language spoken contrary to the rule of law.

Lord Mance later reasoned that the rule is a "controlling mechanism" on the duties owed by a bailee.[99] That offers no rational reason for making an exception. As he acknowledged, an owner who has no immediate right to possession of a chattel and cannot otherwise claim in tort may hold a person liable as bailee but the claim "will arise if, and only if, the defendant's act would on the facts have made him liable in conversion or negligence or trespass proper", meaning the claim "must be treated as ancillary or parasitical to the principal tort to which it

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[89] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847; *Hill v Tupper* (1863) 2 H&C 121

[90] *Brandt v Liverpool SN Co* [1924] 1 K.B. 575; [1923] All E.R. Rep. 656 (implied contracts); *Shanklin Pier v Detel Products Ltd* [1951] 2 K.B. 854; [1951] 2 All E.R. 471 (collateral contracts); *The New Zealand Shipping Company Ltd v A.M. Satterthwaite (The "Eurymedon"*) [1975] A.C. 154; [1974] 1 All E.R. 1015 (Himalaya clauses); *Coulls v Bagot's Executor and Trusted Co Ltd* (1967) 119 C.L.R. 60 (joint promises)

[91] For discussion see, Worthington, *Equity*, (2006) at pt.4 ch.8; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 50ff.

[92] Consent to, or notice of, contractual terms may be a factor in determining the existence and scope of tortious liability. See, for example, *Riyad Bank v Ahli United Bank (UK) Plc* [2006] EWCA Civ 780; [2006] 2 All E.R. (Comm) 777; *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 195; [1994] 3 All E.R. 506 at 533; *Geier v Kujawa, Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep. 364; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; [1963] 2 All E.R. 575

[93] Contracts (Rights of Third Parties) Act 1999, s.1(1)(a), (b); Carriage of Goods by Sea Act 1992, s.2; The Hague-Visby Rules, Art.IV.2bis

[94] Examples include, The Contracts (Rights of Third Parties) Act 1999, ss. 1(1)(b), 3, 6(5); *Riyad Bank v Ahli United Bank (UK) Plc* [2006] 2 All E.R. (Comm) 777 at [46]; *Williams v Natural Life Health Foods* [1998] 1 W.L.R. 830 at 837; [1998] 2 All E.R. 577 at 584; *The Mahkutai* [1996] A.C. 650 at 662-63; Law Commission Report, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242 Cm 3329 July 1996) at para.2.34; standard Grain and Feed Trade Association contracts *https://www.gafta.com/All-Contracts* accessed 18th Nov 2020

[95] *Southcote's Case* (1601) 4 Co. Rep. 83b, 1063

[96] See, for example, *Riyad Bank v Ahli United Bank (UK) Plc* [2006] 2 All E.R. (Comm) 777

[97] V. Palmer, *The Pathways to Privity: The history of third party beneficiary contracts at English law* (New Jersey: The Law Book Exchange, 2006)

[98] *The Pioneer Container* [1994] A.C. 324 established no obvious limitation on the type of terms the rule can apply to, ruling that consent authorises the bailee to regulate the bailment relationship. Therefore, the rule was applied to a jurisdiction clause in this case

[99] *East West Corp. v D.K.B.S. 1912* [2003] Q.B. 1509 at [50]

relates".[100] There are rational, substantive reasons for why this is possible where there is a bailment, as opposed to a "purely tortious duty of care".[101] One reason is to protect the asset or title.[102] A bailor without an immediate right of possession may be entitled to sue where there is a bailment or for reversionary injury where their property has been permanently injured or lost.[103] There may be a particular need to do so where another party has no interest in pursuing the loss on the bailor's behalf.[104] Those reasons, however, do not rationally explain why tortious duties, such as care, owed by a bailee should be controlled by the rule in distinction to a tortfeasor who owed a "purely tortious duty of care"[105] and cannot bind third parties who consented to the terms they performed on. The "controlling mechanism" still rests on the same justificatory principle as contract and it provides no rational reason for the rule not to count as the general rule when the duty is "purely tortious".[106]

V. Bailments as a Conceptual Category of Law: Elevating a Description into a Reason

Lord Denning's reasoning cannot place the function of the rule within the existing legal framework. The only reason left for the rule to function is that it is unique to the law of bailments. That is what Lord Goff held in *The Pioneer Container*. Formal categorisation alone, as the reason for the rule, does not rationally distinguish it from contract. The rule would be trapped in circular reasoning: a consenting third party is bound in bailments because there is a bailment. Both the rule and contract would rest on the same justificatory principle for an action and are distinguished only by the language spoken. To overcome duplication there is a need for independent, substantive reasoning that identifies a distinct function the rule fulfils.

Formal categorisation alone is a shortcoming of several authorities that consider the rule's function is unique.[107] Jones' seminal essay on the law of bailments, for example, concluded that he had "proved" its independent status because it had been "recognised and confirmed

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[100] [2003] Q.B. 1509 at [32]; citing A. Tettenborn, Reversionary Damage to Chattels [1994] C.L.J. 326
[101] [2003] Q.B. 1509 at [50]
[102] For other reasons for exceptions to conceptual rules where there is a bailment see, *Volcafe Ltd v Compania Sud American De Vapores SA (The "Volcafe")* [2018] UKSC 61; [2019] A.C. 358; *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [28] (reverse burden of proof); *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [31]-[32]; Palmer, *Palmer on Bailment* (2009) at para.1-106 (immediate right of possession); *Armstead v Royal Sun Alliance Insurance Co Ltd* [2022] EWCA Civ 497; [2022] R.T.R. 23; *The "Winkfield"* [1902] P. 42 (want of title)
[103] *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [31]-[32]
[104] [2003] Q.B. 1509 at [46]
[105] [2003] Q.B. 1509 at [50]
[106] *The Pioneer Container* [1994] 2 A.C. 324 at 339 – This applies equally to Lord Goff's claim that consent "authorises the bailee to regulate the bailment relationship with the sub-bailee"
[107] As well as the authorities discussed, others include, *Natixis SA v Marex Financial* [2019] EWHC 2549 at [227]; [2019] 2 Lloyd's Rep. 431; *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] 1 Lloyd's Rep. 571 at [136]; *Sandeman Corpimar v Transitos Y Transportes Integrales SL* [2003] EWCA Civ 113 at [53]; *The Mahkutai* [1996] A.C. 650 at 667-68; *Carver on Bills of Lading* (2017) at paras.7-102, 7-104; E McKendrick, "Contract: In General", in A Burrows (ed.), *Oxford Principles of English Law Private Law*, 3rd edn (Oxford: Oxford University Press, 2013) para.8.325; Palmer, *Palmer on Bailment* (2009) at pp.1339-46; Baughen, "Bailment's continuing role in cargo claims" [1999] L.M.C.L.Q. 393; A. Bell, "The Place of Bailment in the Modern Law of Obligations" in N Palmer and E McKendrick (eds), *Interests in Goods* (1998) at p.474; A. Phang, "Exception Clauses and Negligence – The Influence of Contract on Bailment and Tort" (1989) 9 O.J.L.S. 418 at 420; Palmer, 'Sub-bailment on terms' [1988] L.M.C.L.Q. 466 at 471-72; A. Tay, "The essence of Bailment: Contract, Agreement or Possession?" (1966) 5 *Sydney Law Review* 239 at 243

by the wisdom of nations".[108] Palmer identifies that bailments imposes duties where contract and tort does not, such as a duty of care to guard against theft[109] or to enforce a non-contractual promise.[110] Without identifying an independent, substantive reason for imposing liability, these examples rest on the same justificatory principle for a cause of action as contract and tort. Therefore, Palmer is forced to concede that the law of bailments is independent because it is a "refuge for judges who wish to avoid the particular legal consequence dictated by some other cause of action which bailment overlaps"[111] and the functional value of bailments as an independent "source of obligations is that it imposes duties that would otherwise not exist".[112] Palmer is assuming what full protection should look like by arguing consent and negligence should be enforced where there is a bailment without offering independent, substantive reasons for why liability should be where it would not in contract or tort.[113] It is an express admission that bailments, including the rule, is a duplication because its rules rest on the same justificatory principles for an action and fulfil the same function as other categories.

Reliance on formal categorisation only is evident in case law, too. The decision in *Yearworth v North Bristol NHS Trust* held the appellant may have an action in bailments independent of contract and tort.[114] Yet, the so-called "relevant principles of the law of bailment" that justified this conclusion were descriptive. For example, "a bailment can exist independent of contract", "it arises on an assumption of responsibility", and "without contrary authority bailments is unique", offer no substantive or principled basis for an independent cause of action in bailments.[115] In *Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd* independent contractors of a shipowner possessed the shipper's cargo. Relying principally on Lord Denning's judgment in *Morris*, the court held that the contractor had undertaken to take care of the cargo and "the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods".[116] If the dispute is about failure to take care of the cargo, then the cause of action is negligence and the formal rules of the tort function to resolve the dispute.[117] If the dispute is about on what terms they took responsibility for the cargo, then the cause of action is contract and its formal rules function to resolve that dispute. The descriptive term of "voluntarily assuming responsibility for property" distils no substantive, independent basis for why there should be rights in the law of bailments independent from contract or tort.[118]

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[108] W. Jones, *An Essay on The Law of Bailments*, (Philadelphia: Hogan and Thompson, 1836) at pp.1, 140

[109] Palmer, *Palmer on Bailment* (2009) at para.1-051; citing *Ashby v Tolhurst* [1937] 2 K.B. 242; [1937] 2 All E.R. 837; *cf.* McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22 at 25 – who rightly points out Palmer's cases often require a "fundamental re-reading" to reach the conclusions Palmer does. The cases are really bailments being assimilated into the modern law of negligence. This is also true of *Ashby*. It did not hold there was no general liability in tort for failing to carefully guard against theft

[110] Palmer, *Palmer on Bailment* (2009) at para.1-097

[111] Palmer, *Palmer on Bailment* (2009) at para.1-001; Palmer, 'Sub-bailment on terms' [1988] L.M.C.L.Q. 466 at 472

[112] Palmer, *Palmer on Bailment* (2009) at para.1-044; see also at 1-051 "certain liabilities would not arise if there were not a bailment"

[113] See, J. Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to ensure that care is taken' [2015] C.L.J. 109 at 114 – what is a "gap" is no dry, technical question

[114] *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] Q.B. 1

[115] [2010] Q.B. 1 at [48]; *cf.* McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22

[116] *Gilchrist Watt and Sanderson Pty Ltd* [1970] 1 W.L.R. 1262 at 1268

[117] *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 205

[118] See, McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22 at 26-7

To avoid duplication, authorities must go further and provide an independent, substantive basis for rights in bailments that identifies a distinct function the rule fulfils. Before *The Pioneer Container*, it was thought that "consent" was the substantive reason for liability arising from bailments. Consent is a rationally defensible reason for recognising rights in law. As such, one of the more compelling reasons why we should recognise rights in bailments is to have rules that function to "fill gaps" left by the formal rules of contract.[119] Contract law has a high degree of "content formality", meaning its formal rules may be underinclusive relative to its substantive objectives.[120] The recognition and expansion of bailments as an independent causative event may be a phenomenon to recognise rights arising from promises made outside rigid parameters of the law of contract, just as Markesinis observed in the law of torts.[121] In the instance of the rule, "bailments" is a "convenient label" to avoid the rules of contract and bind non-contracting but consenting parties to terms.[122]

"Consent" identifies a substantive basis for why rights should be recognised but it is an answer to a different question about whether contract law is underinclusive relative to its substantive objectives. It is not an answer to the problem of duplication. If the rule functions to fill a perceived gap in the law of contract, the courts would be treating the formal rules of contract as "transparent" to the justificatory principle for the cause of action, consent, and elevating the description of bailments into a reason for distinguishing the cases.[123] Treating contractual rules as transparent to the reason is not a rationally defensible reason for distinction because it puts us back in a position of circularity: Consent to contractual terms is binding on third parties in bailments because there was a bailment. Contract already functions to resolve disputes about consent to contractual terms and we would be distinguishing cases according to the language spoken. Like cases would not be treated alike. Consent, as a substantive reason for recognising the rule in bailments as independent from contract, cannot justify the rule's function with the rule of law.

Subsequently in *The Pioneer Container*, Lord Goff held it is the voluntary assumption of responsibility for another's property that justified the imposition of rights in bailments independent from contract.[124] Consent to bailment on terms, he said, authorises the bailee to regulate the bailment relationship with the sub-bailee.[125] He continued that the substantive reason for recognising bailments as independent and the rule itself was that it is "principled and just" to do so.[126]

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[119] That line of argument can be seen in authoritative academic sources: *Carver on Bills of Lading* (2017) at paras.7.098-104; McMeel, 'The Redundancy of Bailment' [2003] L.M.C.L.Q. 169 at 190, 197-98; A. Tettenborn, 'Contract, Bailment and Third Parties – Again' [1994] C.L.J. 440 at 443

[120] Atiyah and Summers, *Form and Substance in Anglo-American Law* (1987) at p.13; Fried, *Contract as Promise* (1981) at pp.28-40

[121] Markesinis, 'An expanding tort law – the price of a rigid contract law' (1987) 103 L.Q.R. 354 at 388-89; see also, McMeel, 'Bailment: Fertility and the forms of action' [2010] L.M.C.L.Q. 22 at 26; D. Campbell, 'Classification and the Crisis of the Common Law' (1999) 26 *Journal of Law & Society* 369 at 373; Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, (1998) at p.32; Atiyah, *Essays on Contract*, (1986) at p.383

[122] Treitel, *Some Landmarks of Twentieth Century Contract Law*, (2002) at pp.78-9; see also, *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] Q.B. 502 at 511; [1992] 2 All E.R. 450 at 457; Bridge, *Personal Property Law* (2015) at pp.60-1

[123] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 50

[124] *The Pioneer Container* [1994] 2 A.C. 324 at 336-42; see also, *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [26]

[125] [1994] 2 A.C. 324 at 339

[126] [1994] 2 A.C. 324 at 338-39, 342; see also, *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [20]; *Lukoil-Kalingradmorneft Plc v Tata Ltd* [1999] 1 Lloyd's Rep. 365 at 375

This reasoning does not rationally distinguish bailments from contract. The formal categorisation of bailments as independent of contract and "principle and justice" identify no distinct function the rule fulfils where there is a bailment. The rule remains a duplication obfuscated by the language spoken where Lord Goff refers to "voluntary assumptions of responsibility for another's property" and "authorisation to regulate the bailment relationship". The tool that regulates relationships is contract and the rule is still functioning to bind consenting parties to terms, in this case a jurisdiction clause. Therefore, the justificatory principle for the cause of action is still consent and Lord Goff is binding consenting parties to terms in bailments by treating the formal rules of contract as transparent to that reason. The rule remains stuck in circular reasoning because "principle and justice" provide no rational reason for why consent to terms is binding where there is a bailment but not in other third-party consensual relationships.[127] The decision in *The Pioneer Container* was made by elevating the description of bailments into the reason for distinction, the language spoken, contrary to the rule of law.

Other key authorities that argue the rule is unique to bailments as an independent category have fared no better in rationally distinguishing the rule from contract. Lord Steyn reasoned that "no authorities decided on bailments principles were cited which cast doubt on Lord Denning's observation in Morris v Martin".[128] A curious observation given that the other judgments in *Morris* expressly abstained from ruling on the point.[129] Regardless, holding the rule to be "sensible and just" did not identify any distinct function the rule fulfils where there is a bailment, resulting in duplication.[130] The language spoken, "bailments", was the reason for distinguishing it from contract.

More recently, Lord Mance championed bailments. He reasoned that bailments achieves a distinct result from contract because they are "conceptual different… Consent to a sub-bailment … is by definition different from consent to the creation of a direct contractual relationship between the bailor and sub-bailee".[131] Lord Mance relies on formal categorisation and, like Lord Goff, did not explain why this conceptual difference should produce a result distinct from contract while resting on the same justificatory principle for a cause of action. The difference is no more than a description of bailments that is elevated into the reason for distinguishing the rule from contract. We remain stuck in circular reasoning. The reason for distinction from contract was based on the language spoken, contrary to the rule of law.

Without an independent, substantive reason identifying a distinct function for the rule, its distinction from contract is dependent on formality only. The rule remains a duplication because the justificatory principle for it is the same as contract, consent. Bailments is unique, as the reason for the rule, cannot justify its function with the rule of law.

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[127] N. Bankes and N. Rafferty, "Privity of Bailment – Liability of sub-bailee to owner of goods: The Pioneer Container" (1997) 28 Can. Bus. L.J. 245 at 264

[128] *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164 at 168; [1988] 1 F.T.L.R 442

[129] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716 at 731, 741 *per* Diplock L.J. and Salmon L.J.

[130] *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164 at 168

[131] *Targe Towing Ltd v Marine Blast Ltd* [2004] EWCA Civ 346 at [28]; [2004] 1 Lloyd's Rep. 721; see also *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [24], [26], [69]

VI. Consequences of Duplication

If the justificatory principle for the rule and contract is the same but produce distinct results based on the language spoken, the rule cannot be rationally distinguished from contract to justify its function with the rule of law. Nonetheless, consent is a rational reason to recognise rights in law. Following the rule may avoid injustice without harming the rule of law. By binding the bailor to their consensual promises the precedent bailments sets becomes an independent, authoritative reason to follow it and we can be certain that where there is a bailment consenting parties are bound and it takes priority over contract. To not follow the rule in the next bailments case would result in unequal treatment of like cases.[132] Therefore, it would be possible to conclude that contract law is underinclusive relative to its substantive objectives and it should be reformed, making the rule redundant. However, if the formal rules of contract are underinclusive, the way to resolve that problem is to discuss what the formal rules should be.[133] Instead, by resorting to the verbal formulae of bailments to distinguish the rule from contract and create duplicative rules, this causes a second problem for the rule of law.

If bailments is deployed whenever "principle and justice" demand "to avoid the particular legal consequence dictated by some other cause of action which bailment overlaps", the rule is distinguishable only by bailments' descriptive terms. Those descriptive terms, such as superior, exclusive, or independent control, transfer of possession,[134] and continuous possession,[135] provide no independent, substantive basis for why the rule in bailments should produce a distinct result from contract. "Principle and justice" offer nothing as to why a distinction should be made where there is a bailment. Therefore, bailments is a "labile" concept because its descriptive terms can be lightly manoeuvred whenever a judge thinks consent to terms should be binding as they do not have to substantively rationalise why it does.[136] That is to resolve disputes according to a discretion, not law.

The risk of a discretion being exercised is evident in the arbitrary way it is decided whether there is a bailment. "Principle and justice" cannot explain why a volunteer is treated differently to someone in possession via the operation of law.[137] Nor can it explain the distinction between a subsequent purchaser endorsed a bill of lading who can claim in bailment[138] but a subsequent purchaser who is not endorsed the bill cannot.[139] Also, it cannot resolve peripheral cases, such as whether a person has "volunteered" if they are knowingly transferred possession of unknown subject material or if they are unaware of the existence of the bailor.[140]

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[132] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 889

[133] D. Harris and C. Velijanovski, "Liability for Economic Loss in Tort" in M. Furmston (ed.), *The Law of Tort* (London: Duckworth, 1986) at p.59

[134] D. Sheehan, *The Principles of Personal Property Law*, 2nd edn (Oxford: Hart Publishing, 2017) at p.239-40; T Lin, *Personal Property Law* (Singapore: Academy Publishing, 2014) at p.192-93

[135] *Lotus Cars Ltd v Southampton Cargo Handling Plc (The "Rigoletto")* [2000] 2 All E.R. 705; [2000] 2 Lloyd's Rep. 532

[136] Stapleton, "Duty of care: peripheral parties and alternative opportunities for protection" (1995) 111 L.Q.R. 301 at 326; see also, Atiyah, *Essays on Contract*, (1986) at pp.381-3 – who described "voluntary assumptions of responsibility" as "contract"

[137] *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181

[138] *Sonicare International Ltd v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep. 48 at 53

[139] *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* (*The "Aliakmon")* [1986] A.C. 785 at 808, 818; [1986] 2 All E.R. 145 at 148, 155-56

[140] *Bowden v Pelleter* (1315) YB. 8 Ed. 2 at 75; S. Stoljar, "The Early History of Bailment" (1957) 1 Am. J. Legal Hist. 5 at 18-20 (knowledge of the subject material); *Awad v Pillai* [1982] R.T.R. 266;

The arbitrary nature for resolving uncertainties in bailments is tolerable to the rule of law because the outcome produces a degree of certainty to future parties. Instead, the strongest evidence of the rule of law being eroded by the exercise of a discretion is inconsistent decision-making. In the House of Lords decision of *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")*[141] the descriptive term "continuous possession" was manoeuvred by the court to reach the desired outcome but was inconsistent with prior case law. The cargo-interest had contracted with the contractual carrier for carriage of cargo. The carrier sub-contracted the work to the shipowner. The shipowner negligently damaged the cargo. The cargo-interest sued in tort but the shipowner wished to rely on the exclusion clause in the contract between the cargo-interest and charterer to which they were not a party. The court held the exclusion clause was a Himalaya clause: a unilateral offer by the carrier as agent for the cargo-interest accepted upon performance by the shipowner.[142] However, the exclusion clause lessened the liability of the shipowner contrary to the Hague Rules, which sets down mandatory minimum liability of the carrier and the ship in a "contract of carriage".[143] The clause would be void if those rules were applicable.[144] However, precedent was against the cargo-interest, which held that Himalaya Clauses accepted by stevedores were "contracts of exclusion", not "carriage".[145] The court distinguished the stevedores cases because the shipowner's possession amounted to a bailment and, therefore, constituted a contract of carriage to which the Hague Rules applied because bailments is unique.[146]

On its face, there is nothing that rationally distinguishes *The Starsin* from the stevedores cases. *The Starsin* was a bailment, the stevedores cases were not.[147] To understand the distinction was a discretion being exercised by manoeuvring the descriptive terms of bailments to reach the outcome desired, three more cases must be considered.

The Starsin cited *Scruttons* as support for the distinction.[148] *Scruttons* held stevedores were not bailees.[149] Stevedores had taken possession of the cargo for the purpose of loading and negligently dropped it during the loading operation in breach of their duty of care. The reason stevedores were not bailees has subsequently been explained in *Lotus Cars Ltd v Southampton Cargo Handling Plc (The "Rigoletto")*.[150] In this case stevedores were bailees. *The Rigoletto* distinguished *Scruttons* on the basis that both owed a duty of care but the stevedores' possession in *Scruttons* was "fleeting", whereas in this case it had been continuous.[151] From this we may infer that the reason the shipowner was a bailee was that their possession was continuous.

[1981] *The Times*, June 6th; N. Palmer and J. Murdoch, "Defining the Duty of the Sub-bailee" (1983) 46 M.L.R. 73 (knowledge of the existence of a bailor)

[141] [2003] 1 Lloyd's Rep. 571

[142] *Adler v Dickson (No 1)* [1955] 1 Q.B. 158; [1954] 3 All E.R. 397

[143] The Hague Rules, Art. I(a)

[144] The Hague Rules, Art. III.8

[145] *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] 1 Lloyd's Rep. 571 at [154]-[156]; referring to *The New Zealand Shipping Company Ltd v AM Satterthwaite (The "Eurymedon")* [1975] A.C. 154; and *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The "New York Star")* [1981] 1 W.L.R. 138; [1980] 3 All E.R. 257

[146] [2003] 1 Lloyd's Rep. 571 at [135]-[136], [153]-[162]

[147] [2003] 1 Lloyd's Rep. 571 at [154]

[148] [2003] 1 Lloyd's Rep. 571 at [146]

[149] *Midlands Silicones Ltd v Scruttons Ltd* [1959] 2 Q.B. 171 at 189; [1959] 2 All E.R. 289 at 296-97; approved on appeal *Scruttons Ltd v Midlands Silicones Ltd* [1962] A.C. 446 at 470

[150] [2000] 2 All E.R. (Comm) 705

[151] [2000] 2 All E.R. (Comm) 705 at [42]

However, the requirement that possession must be continuous to amount to a bailment is inconsistent with prior case law. The decision in *Singer* is almost identical to *Scruttons*. The port authority had taken possession of the cargo for the purposes of loading and negligently dropped the cargo in breach of their duty of care. Nonetheless, in *Singer* the port authority was a bailee, despite their possession also being "fleeting" like the stevedores in *Scruttons* who were not. Lord Steyn proceeded on the basis that the port authority was a bailee without rationalising why. Now there is one case which says "fleeting possession" does not amount to a bailment and another that implies that it does. Therefore, *The Starsin* cannot point to consistent authority that unequivocally supports its conclusion that the shipowner should be distinguished from stevedores because their possession amounted to a bailment. The descriptive term "continuous possession" is used to lightly move around the boundaries of bailments to reach the desired outcome in those cases without rationalising why it produces a distinct result from the contract cases. *The Starsin* may have reached a just outcome. The court did not want the Hague Rules avoided by having the work sub-contracted to a shipowner.[152] But the court exercised a discretion to get there by choosing to speak the language of bailments, not law.[153]

1. The uncertainty of bailments and duplication: Consent, legal rules, and principle

The exercise of a discretion to bind consenting parties to terms means there is good reason for denying the potential injustice in not holding the bailor to their consensual promise and making the bailee liable to a greater extent than they agreed to. If the court speaks the language of bailments at its discretion, the duplicative rule risks foisting contractual liability onto the parties. If they do so, this will redistribute the risk they consented to in contract, undermining their individual liberty, reorder established legal rules, and erode the rule of law at a principled level.

The risk of the rule foisting contractual liability onto the parties is possible where a gratuitous promise is made by A to B who does not intend it to be binding but it is best evidenced when work is sub-contracted to C on terms. In *The Makhutai*, Lord Goff reasoned that if the rule is not applied it would be to contradict the promise given by redistributing "the contractual allocation of risk".[154] A bailor has consented to the bailee sub-contracting on those terms and the sub-bailee has agreed to perform on those terms. To not apply the rule would be to give the bailor the benefit of the sub-contract without the respective burden by making the sub-bailee liable to a greater extent than they agreed to.[155] But we cannot be sure consent from the putative bailor to sub-contract on terms is a promise to be bound to the sub-contractor on those terms.[156] Another possibility is that the consent to sub-contracting on terms is deliberate intent to avoid contractual liability with third parties. Paradoxically, it was Lord Goff who reasoned that the usual inference is that parties who sub-contract do not intend to be bound.[157] If the court thinks the consent to sub-contracting on terms should be binding on non-

[152] *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] 1 Lloyd's Rep. 571 at [148], [162]
[153] *Cf.* [2003] 1 Lloyd's Rep. 571 at [212]
[154] *The Makhutai* [1996] A.C. 650 at 661; see also, R. Goff, "Commercial Contracts and the Commercial Court" [1984] L.M.C.L.Q. 382 at 391
[155] See, *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep. 215; *cf. The Pioneer Container* [1994] 2 A.C. 324 at 340-42
[156] See, for example, Gibbs-Kneller, Whayman, Gindis, "Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms" (2022) 23(3) E.B.O.R. 573 at 584-88
[157] *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 195-96; B. Markesinis (ed.), *The Gradual Convergence, Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (Oxford: Clarendon Press, 1994) at p.130; see also, Atiyah, *Essays on Contract*, (1986) at pp.381-82

contracting parties but that is not what the parties intended, speaking the language of bailments means the parties are bound despite the absence of consent. If so, injustice is caused to the parties by following the rule, rather than not following it.

Foisting contractual rights onto the parties will cause injustice because it will redistribute the risk they did consent to, undermining their individual liberty. *Sonicare International Ltd v East Anglia Freight Terminal* is illustrative of this.[158] Meteor had bailed radios over to the carrier who, in turn, had sub-contracted with a warehouse for storage. Sonicare paid for the goods against a documentary tender of the bill of lading. Some of the radios went missing from the warehouse. There was no contract or agency between Sonicare and the warehouse.[159] Nor could Sonicare prove they acquired title before the cargo went missing to pursue a claim in tort but, nonetheless, the court held that Sonicare were not the original bailors but could claim in bailment having paid for the goods against the documents.[160] Here we observe how the court manoeuvred the descriptive terms of bailments. Contractual rights under the bill of lading are not transferable at common law[161] and tortious liability requires legal or possessory title at the time the loss occurred.[162] No substantive reasons were given for why a subsequent purchaser endorsed a bill of lading may claim against the warehouse in bailments but not contract or tort. They simply chose to speak the language of bailments.[163] A discretion, not law.

By manoeuvring the terms of bailments to fit the facts, its rules were now in full view of the court. It was possible to hold Sonicare bound to the warehouse's terms because there had been implied consent from Meteor to sub-contract.[164] But we cannot be sure that consent from Meteor to sub-contract was consent to be bound to the sub-contractor. It is certainly not necessary for the contract to function. In shipping, the shipper may lack logistical expertise to ship goods internationally. Contracting with an intermediary can reduce the shipper's transaction costs compared to arranging all the necessary contracts personally, such as warehousing. Those third parties the intermediary contracts with may charge a higher price to the bailee to protect themselves from third-party claims. Despite this contractual allocation of risk, if the court speaks the language of bailments the bailor will be given something for free that they would otherwise have had to pay for, while the sub-bailee may have charged for a risk that was never to materialise or are given the protection for free if they did not. Therefore, if Meteor did not intend their consent to sub-contract as consent to be bound to the sub-contractor, by speaking the language of bailments the rule is foisting contractual liability onto the parties, redistributing the risk they did consent to.[165]

If contractual liability can be foisted onto parties by speaking the language of bailments, another reason to deny the potential injustice in not following the rule is duplication can disrupt the certainty of established legal rights, such as in secured credit transactions.[166] If courts

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[158] *Sonicare International Ltd v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep. 48
[159] [1997] 2 Lloyd's Rep. 48 at 52
[160] [1997] 2 Lloyd's Rep. 48 at 53
[161] *Thompson v Dominy* (1845) 14 M&W 403, 153 E.R. 532
[162] *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* (*The "Aliakmon")* [1986] A.C. 785 at 809; *Margarine Union GmbH v Cambay Prince Steamship Co Ltd (The "Wear Breeze")* [1969] 1 Q.B. 219; [1967] 3 All E.R. 775
[163] *Sonicare International Ltd v East Anglia Freight* Terminal [1997] 2 Lloyd's Rep. 48 at 53
[164] [1997] 2 Lloyd's Rep. 48 at 53-54
[165] For detail on the court's commitment to individual liberty and the problems associated with "free-riding" see, Stapleton, "Duty of care: peripheral parties and alternative opportunities for protection" (1995) 111 L.Q.R. 301
[166] Other examples include, R. Aikens, 'Which way to Rome for cargo claims in bailment when goods are carried by sea?' [2011] L.M.C.L.Q. 482 (conflicts of law); Swadling, "The Proprietary Effect of a

speak the language of bailments, a creditor's security may be treated as subordinate to a sub-contractor's personal right to the property because the creditor's consent to sub-contracting is binding with the third party. A rational response from the creditor to the increased risk to their security is to either charge a higher price for credit or to limit the use of the property. Either option is rarely desirable.

That risk can be evidenced by drawing from the facts of *PST Energy 7 Shipping LLC v O W Bunker Malta Ltd*.[167] RMUK contracted with RNB for use of bunkers only in the "propulsion of the Vessel". The contract was on terms containing a 60-day credit period and retention of title clause until full payment was made. RMUK had also consented to sub-contracting on terms permitting use.[168] RMUK contracted with OWBM who then contracted with the Owners on similar terms. OWBM went insolvent having not paid for the use of the bunkers. The dispute concerned whether the Owners were liable to pay OWBM for their use. However, it was possible RMUK would look to the Owners to recover their loss for non-payment.[169] Had any of the bunkers remained, RMUK would have looked to recover them from the Owners. The court held that there was a bailment relationship and the Owners were obliged to pay for their use.[170] In such a situation the courts would be faced with duplicative rules. If the court speaks the language of contract, RMUK could exercise a property right over any unused bunkers to recover possession from the Owners.[171] Bailments, however, would say the seller's consent to sub-contracting on terms to use is binding on them. Provided the Owners pay OWBM, RMUK would not be able to recover them without incurring personal liability, subordinating their property right to the Owner's personal one. That would be contrary to what they bargained for with OWBM in the event of non-payment. Giving preference to the personal right may have the undesirable side effects mentioned. Bunkers are intended for use and "terms prohibiting use would be uncommercial".[172] The seller may respond to that risk with more onerous credit terms that either increases the cost of security or limits the use of bunkers.

Finally, the risk of injustice by not following the rule should be denied because the exercise of a discretion that foists contractual liability onto parties weakens the rule of law at a principled level. Duplication creates a schism in law, a conceptual incoherence. If the parties cannot be sure which language the court will speak, they cannot plan their affairs with certainty because they cannot be sure which rule will apply. For example, stevedores will have difficulty knowing how to contract given the risk of unforeseen events prolonging their possession of cargo and at what arbitrary point that possession tips from being fleeting to continuous.[173] Consequentially, there can then be no equality before the law if disputes are resolved based on the language spoken, as parties win or lose cases without good reason.[174] The bailments judge will say consenting third parties are bound while the contract judge will say they are not. That discretion will allow parties to act opportunistically by switching between causes of action

Hire of Goods", in Palmer and McKendrick (eds), *Interests in Goods* (1998) at Ch 20 (hire agreements)

[167] [2016] UKSC 23; [2016] A.C. 1034

[168] [2016] A.C. 1034 at [8]

[169] [2016] A.C. 1034 at [9]

[170] [2016] A.C. 1034 at [26]-[28]

[171] *Hill v Tupper* (1863) 2 H&C 121; *cf*. *The Manchester Shipping Canal Co Ltd v Vauxhall Motors Ltd* [2019] UKSC 46; [2020] A.C. 1161 (equitable relief from forfeiture)

[172] *PST Energy 7 Shipping LLC v O W Bunker Malta Ltd* [2016] A.C. 1034 at [27]

[173] See, Palmer, *Palmer on Bailment* (2009) at para.1-044

[174] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 25-6, 39-40; Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 6-7, 52, 97

to avoid limitations of the other.[175] The law then becomes harder to apply, creating a strain on court resources. Nefarious individuals may also use the incoherence to advance an agenda if they can point to cases on the books where the rule of law has not been observed.[176] The benefits of the rule of law will be weakened if this incoherence is not resolved.[177]

VII. Conclusion

Contractual rules can be underinclusive relative to contract's substantive objectives. To prevent injustice, maybe contract should be reformed or the rule should be retained in certain contexts.[178] Those questions have not been the concern here. What has been argued first is the rule is a duplication. The reasoning for the rule does not rationally distinguish it from contract to justify its function with the rule of law because it rests on the same justificatory principle for a cause of action in contract, consent. As a contextual category of law, the reasoning for the rule cannot place its function within the existing conceptual framework independent of contract, there was no precedent for the rule, and "bailments" is not a rational reason for making an exception to formal conceptual rules. The only reason for it to function is that it is unique to the law of bailments. However, "principle and justice" does not identify a distinct function the rule has where there is a bailment. It rests on the same justificatory principle as contract and that means it is still a duplication of the formal rules of contract. "Bailments" is elevated into the reason for distinction, the language spoken, contrary to the rule of law.

That duplication erodes the rule of law further because bailments itself is uncertain. If the rule rests on the same justificatory principle as contract, it is the verbal formulae of bailments that distinguish the two. Without independent, substantive reasons that identify a distinct function for the rule, the descriptive terms of bailments can be lightly manoeuvred at the court's discretion whenever they think consent should be binding to reach an outcome contrary to what the formal rules of contract demand because they do not have to rationalise why they do so, producing arbitrary and inconsistent outcomes. The absence of independent, substantive reasons that identify a distinct function for the rule in bailments is conspicuous of a discretion being exercised to avoid the formal rules of contract because the pioneers behind bailments, Lords Denning, Steyn, and Goff, have all expressed objections to their rigidity.[179]

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[175] *East West Corp v D.K.B.S. 1912* [2003] Q.B. 1509 at [32]; see also, Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, (1998) at pp.18-19; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) at pp.29, 73; Atiyah, "Medical Malpractice and the Contract/Tort Boundary" (1986) 49 Law & Contemp. Probs. 287 at 288-89

[176] Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] U.W. Austl. L. Rev. 1 at 52

[177] Lewis, "Precedent and the Rule of Law" (2021) 41(4) O.J.L.S. 873 at 879, 881-82, 885, 896; Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467 at 469, 471; *cf.* Dworkin, *Law's Empire* (1998) at 44 – "it is obtuse to deny [the benefits of the rule of law] just because we sometimes disagree about what the law actually is"

[178] See, for example, Bridge, *Personal Property Law* (2015) at p.65; Baughen, 'Bailment's continuing role in cargo claims' [1999] L.M.C.L.Q. 393

[179] Examples include, *Heywood v Wellers* [1976] Q.B. 446 at 449; [1976] 1 All E.R. 300 at 305; *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; [1975] 3 All E.R. 92; *Drive Yourself Hire Co v Strutt* [1954] 1 Q.B. 250; [1953] 2 All E.R. 1475; A. Denning, *The Discipline of Law*, (Oxford: Butterworths, 1979) at pp.285-313 (Lord Denning); *Homburg Houtimport BV v Argosin Private Ltd (The "Starsin")* [2003] 1 Lloyd's Rep. 571 at [57]-[62]; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68 at 76-8; [1995] 3 All E.R. 895 (Lord Steyn); *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 196; *The Mahkutai* [1996] A.C. 650 at 665; *White v Jones* [1995] 2 A.C. 207

The risk of injustice in not following the rule should be denied because duplication and discretion may foist contractual liability onto parties. If the court exercises a discretion by speaking the language of bailments, applying the rule may be contrary to what they intended in contract. Therefore, the duplicative rule can redistribute the contractual allocation of risk they did agree to, undermining their individual liberty, reorder established legal rights, and erode the rule of law at a principled level. In the absence of the rule being rationalised, either as independent or exceptional, what is needed to resolve this conceptual incoherence and reduce the risk of injustice occurring is a discussion about when contractual terms should be binding.[180] Until that happens, the consequence is that the benefits of the rule of law will be weakened. In conclusion, there should be one rule, not two.

at 268; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* (*The "Aliakmon")* [1985] Q.B. 350 at 399; [1985] 2 All E.R. 44 at 77; Markesinis (ed.), *The Gradual Convergence, Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century* (1994) at Ch 3; R. Goff, "Commercial Contracts and the Commercial Court" [1984] L.M.C.L.Q. 382 at 391 (Lord Goff)

[180] Sherwin, "Legal Taxonomy" (2009) 15 LEG. 25 at 36; Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution*, (1998) at p.32; Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' [1996] U.W. Austl. L. Rev. 1 at 49; Harris and Velijanovski, 'Liability for Economic Loss in Tort' in Furmston (ed.), *The Law of Tort* (1986) at p.59