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## A Re-Examination of the Winkfield Case

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which must be clarified by future decisions of the Supreme Court, whether the *Berwind* case opens up the possibility of multiple-state taxation of interstate sales.<sup>11</sup>

SAMUEL J. WARMS†

#### A RE-EXAMINATION OF THE WINKFIELD CASE

The *Winkfield*<sup>1</sup> case established the modern rule declaring the respective rights and liabilities existing within the legal triangle involving a bailor, the bailee and a third party who damages or converts the bailor's property while in the bailee's possession. A collision between the steamships *Mexican* and *Winkfield* had resulted in the loss of the *Mexican* with some of the mail she was carrying. The owners of the *Winkfield* paid a certain amount into court to cover the loss. The issue framed was whether the British Postmaster-General might recover out of that sum the full value of the letters, etc., in his possession as bailee, which had been lost through the collision. The Probate Court, relying on the authority of *Claridge v. South Staffordshire Tramway Co.*,<sup>2</sup> decided that since the Postmaster-General, as representative of the crown, was not under any liability to the parties interested in the lost letters, etc., he was precluded from recovering for their value. The Court of Appeal reversed this holding, and decided that ". . . in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, though he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed."<sup>3</sup> The court herein expressly overruled the *Claridge* case, declaring the position taken by that tribunal to be untenable.<sup>4</sup> That case had decided that a bailee who was under no liability to his bailor for any damage to the property bailed could not recover for the value of the property.<sup>5</sup>

11. See Powell, *loc. cit. supra* note 3.

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1. [1902] P. 42 (C. A.). See (1902) 15 HARV. L. REV. 585; (1900) 13 HARV. L. REV. 411.

2. [1892] 1 Q. B. 422, later criticized in *Meux v. Great Eastern Ry.*, [1895] 2 Q. B. 387, 394. See (1892) 6 HARV. L. REV. 156.

3. The *Winkfield*, [1902] P. 42, 54 (C. A.). Accord: *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114 (1887). See also *Russel v. Butterfield*, 21 Wend. 300, 303 (N. Y. 1839); *Mechanics Bank v. National Bank*, 60 N. Y. 40, 52 (1875).

4. The *Winkfield*, [1902] P. 42, 54 (C. A.).

5. Formerly, in cases of bailments, it was explained that the bailee's right to recover the full amount was predicated on his liability over to the bailor. 2 BL. COMM. \* 395; 2 KENT, COMM. (14th ed. 1896) 585; HOLMES, THE COMMON LAW (1881) 167. Judge Story had expressed the opinion that a gratuitous bailee could maintain an action of trespass or trover against a wrongdoer if the bailee would be liable over to the bailor. STORY, BAILMENTS (9th ed. 1878) 248. See also *Rooth v. Wilson*, 1 Barn. & Ald. 59, 106 Eng. Reprints 22 (1817) (requiring that bailee be liable over to bailor before he could recover); *Barker v. Miller*, 6 Johns. 195 (N. Y. 1810). This notion of liability over was manifest as late as the *Claridge* case. The bailee, under the circumstances, was not liable to the owner; therefore, the court held he could recover only for the value of his interest.

The *Claridge* case also argued that a bailee in possession having suffered no loss, could not

However, the controversial element in the *Winkfield* case arises out of the sweeping corollary enunciated by the court in proposing that the wrongdoer, having once paid *full* damages to the bailee, had a complete defense to any action brought against him by the bailor.<sup>6</sup> "This doctrine, that a bailor is barred by what has occurred between the bailee and the wrongdoer, gives us pause,"<sup>7</sup> says Professor Warren. Consequent upon the expression of such doubt there has arisen a vigorous, if not too vociferous, opposition to the *Winkfield* corollary. It is the purpose of this paper to examine both the rule and corollary, to see whether or no the good ship *Winkfield* has weathered the stormy sea of criticism.

The complaint has been lodged that because of the sweeping broadness of the *Winkfield* corollary, the courts are not giving due consideration to the rights of the general owner of the property.<sup>8</sup> It has been asserted that under the corollary of this case, possession carries with it the incidents of title, not only against the wrongdoer, but also against the legal owner.<sup>9</sup> Thus, the problem is presented: does this doctrine put a premium on possession so as to completely obliterate the general title of the bailor who happens to be out of possession of the goods when they are damaged or converted?<sup>10</sup>

### *The Winkfield Rule*

An appraisal of the "rule" of the *Winkfield* case will suffice to show that there is much justification for it in legal precedent. From the earliest periods of the Common Law,<sup>11</sup> possession has been regarded as the foundation of many legal rights<sup>12</sup> in the law of property. One of its most significant attributes is that as

recover any damages in the action. The court conceded that the bailee had a right to maintain the action; but, said the court, the right to maintain the action had ". . . nothing to do with the measure of damages recoverable in such action." *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 424.

6. *The Winkfield*, [1902] P. 42, 61 (C. A.). See also *United Fruit Co. v. United States*, 33 F. (2d) 664 (C. C. A. 5th, 1929); 2 KENT, COMM. 585.

7. Warren, *Qualifying as Plaintiff in Conversion* (1936) 49 HARV. L. REV. 1084, 1096 (hereafter cited: Warren). See also (1912) 25 HARV. L. REV. 655.

8. Warren at 1097. See (1911) 25 HARV. L. REV. 655. See *Brinsmead v. Harrison*, L. R. 8 C. P. 584, 587 (1871).

9. Warren, at 1097.

10. For the purposes of this paper, the conversion cases offer a most convenient method of illustrating problems which arise as well in other fields, *i.e.*, negligent injury to chattels in the possession of a bailee. *Industrial and General Trust Co. v. Todd*, 170 N. Y. 233, 63 N. E. 285 (1902); *Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671 (1924).

11. *Armory v. Delamirie*, 1 Str. 504, 93 Eng. Reprints 664 (K. B. 1722); *Jeffries v. Great Western Ry.*, 5 E. & B. 802, 806, 119 Eng. Reprints 680, 681 (Q. B. 1856) (the person who has the possession has the property); 2 KENT, COMM. 585.

12. The concept of possession is of major significance in almost all branches of the law. Delivery of possession is necessary to effectuate a valid *gift* [*Young v. Young*, 80 N. Y. 422 (1880); *Matter of Cohn*, 187 App. Div. 392, 176 N. Y. Supp. 225 (1st Dep't 1919)]; *pledge* [*Robertson v. Robertson*, 186 Mass. 308, 71 N. E. 571 (1904); *Clark v. Costello*, 79 Hun 588, 29 N. Y. Supp. 937 (1894)]; or *bailment* [*Trunick v. Smith*, 63 Pa. 18 (1868); *Bertig v. Norman*, 101 Ark. 75, 141 S. W. 201 (1911)]. Of course, the delivery of possession

against a stranger, possession<sup>13</sup> is tantamount to title. Possession is good against a wrongdoer and the latter cannot set up the *jus tertii* unless he claims under the general owner;<sup>14</sup> for, unless the wrongdoer so defends he is quite unconcerned, in the eyes of the law, with the rights of the possessor, other than his (the possessor's) right to the immediate possession of the goods. One of the strongest manifestations of this principle is to be found in *Armory v. Delamirie*.<sup>15</sup> There the plaintiff, seeking to recover for the conversion of goods, which had been found by him and tortiously retained by the defendant to whom he had given the goods to inspect, was allowed to recover their *full* value. The court, admitting that the plaintiff was a mere *finder* in possession, still asserted that he had a property in the goods sufficient to entitle him to the verdict.<sup>16</sup> This theory finds its root in the resolute efforts of the law to protect the right of possession as such. Thus, pledgees,<sup>17</sup> conditional buyers<sup>18</sup> and chattel mortgagors<sup>19</sup> in possession have been allowed a recovery for property damaged or converted.

Since a mere finder has been granted the legal privilege of recovering the full value of goods converted or damaged, then there is no gainsaying the fact that a bailee is sufficiently interested in the goods over which he has charge to

occurs in many cases by operation of law. See *Tuxworth v. Moore*, 9 Pick. 346, 347 (Mass. 1830); *Dillenback v. Jerome*, 7 Cow. 294, 297 (N. Y. 1827).

Under our penal statutes, larceny is defined as a crime against the right of possession. N. Y. PENAL LAW (1907) § 1290 (1) (2). See *Phelps' Case*, 49 How. Pr. 437, 440 (N. Y. 1875); *People v. Burnham*, 119 App. Div. 302, 104 N. Y. Supp. 725 (1st Dep't 1907).

In the field of torts, a conversion is a violation of one's right of possession. *Industrial & General Trust Co. v. Todd*, 170 N. Y. 233, 63 N. E. 285 (1902); *Casey v. Kastel*, 237 N. Y. 305, 142 N. E. 671 (1924). See also HOLMES, *THE COMMON LAW* (1881) 206.

13. *The Winkfield*, [1902] P. 42, 60 (C. A.) ("as between bailee and stranger, possession gives title—that is, not a limited interest, but absolute and complete ownership. . ."). See also *Anderson v. Gouldberg*, 51 Minn. 294, 53 N. W. 636 (1892); *Emerson v. Thompson*, 59 Wisc. 619, 18 N. W. 503 (1884).

14. *White v. Webb*, 15 Conn. 302 (1842); *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633 (1892); *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360 (1886); POLLOCK AND WRIGHT, *POSSESSION IN THE COMMON LAW* (1888) 91. *Contra*: *Glenn v. Garrison*, 17 N. J. L. 1 (1839). See also *Heilwig v. Nybeck*, 179 Mich. 292, 146 N. W. 141, 143 (1914).

15. 1 Str. 504, 93 Eng. Reprints 664 (K. B. 1722).

16. *Ibid.*

17. See *Adams v. O'Connor*, 100 Mass. 515 (1868); *Einstein v. Dunn*, 61 App. Div. 195, 70 N. Y. Supp. 520 (1st Dep't 1901), *aff'd*, 171 N. Y. 648, 63 N. E. 1116 (1902).

18. See *Harrington v. King*, 121 Mass. 269, 271 (1876); *Angell v. Lewistown State Bank*, 72 Mont. 345, 351, 232 Pac. 90, 93 (1925); *Burnett v. Dunnigan*, 165 Wash. 164, 169, 4 P. (2d) 829, 831 (1931); 3 JONES, *CHATTEL MORTGAGES AND CONDITIONAL SALES* (6th ed. 1933) § 1395.

19. See *Vandiver v. O'Gorman*, 57 Minn. 64, 66, 58 N. W. 831 (1894); *Brickley v. Walker*, 68 Wis. 563, 574, 32 N. W. 773, 779 (1887); 2 JONES, *CHATTEL MORTGAGES AND CONDITIONAL SALES* (6th ed. 1933) § 440.

Of course the interest of the chattel mortgagor in the property in question is greater than that of the ordinary bailee in that, though title has passed from the mortgagor to the mortgagee, yet, he has the power to redeem his property on payment of the amount secured by the mortgage, and so can be re-invested with title.

give him a right of action against any wrongdoer for the full damage for any conversion to the goods. Bailees have been held to have an interest in goods in their possession sufficient to enable them to procure insurance on the goods and to collect for their full value. However, the bailor may, in the event of recovery by the bailee, collect from the bailee the surplus above the bailee's interest, which is held by the bailee in trust for the benefit of the bailor.<sup>20</sup>

Under Section 210 of the New York Civil Practice Act which, with a few exceptions with which we are not now concerned, provides that every action must be prosecuted in the name of the real party in interest, it has been held that either the general owner or a bailee having a special interest therein can maintain an action for an injury to, or conversion of, the chattel.<sup>27</sup> The bailee certainly has an interest in the goods, a right of which he may not be unjustly deprived. It is a right for which, in most cases, the bailee has paid.<sup>22</sup>

However, though the rule of the *Winkfield* case has been accepted as sound, it is the dictum in the *Winkfield* case which has been assailed by some critics of the law.

#### *The Winkfield Corollary*

In brief the corollary of the *Winkfield* rule is that a *full* recovery by the bailee against the wrongdoer is a defense to any action thereafter prosecuted by the bailor. The doctrine has been attacked as an anomaly in the law.<sup>23</sup>

Professor Warren, who disagrees with the doctrine, launches his broadside against the corollary by suggesting that ". . . if the bailee's collection from the wrongdoer is to bar the bailor from any action against the wrongdoer, the law ought not to allow the bailee to collect full damages, unless that is done with the express or implied *consent* of the bailor".<sup>24</sup> He doubts the propriety of a rule so sweeping as to allow the bailee a full recovery, and so bar the bailor, regardless of the will of the bailor.

20. *Goldstein v. Harris*, 130 So. 313 (Ala. App. 1930); *Stillwell v. Staples*, 19 N. Y. 401 (1859) (where the insurance is affected by the bailee as a *mere volunteer*, he may modify or abandon it at his pleasure, until the principal has, in some way, ratified or adopted the contract of insurance); *Exton & Co. v. Home Fire & Marine Ins. Co.*, 249 N. Y. 258, 164 N. E. 43 (1928); *Siter v. Morris*, 13 Pa. 218 (1850). See (1931) 16 CORN. L. Q. 396; (1939) 24 CORN. L. Q. 598; (1938) 38 COL. L. REV. 1097.

21. *Green v. Clarke*, 12 N. Y. 343 (1855).

A common carrier may sue for an injury to property entrusted to him to be carried. *Merrick v. Brainard*, 38 Barb. 574 (1860), *aff'd*, 34 N. Y. 208 (1866).

The test laid down in the cases in determining whether the plaintiff is the real party in interest is: will recovery or satisfaction by him bar all claims by others? See *Borgos v. Price*, 140 Misc. 287, 250 N. Y. Supp. 457 (Sup. Ct. 1931); *Maynes v. Luciano*, 154 Misc. 519, 520, 278 N. Y. Supp. 335, 336 (City Ct. 1935).

22. *Corcoran v. Huntington Lumber & Coal Co.*, 211 App. Div. 803, 206 N. Y. Supp. 752 (2d Dep't 1924) (plaintiff was the prospective purchaser of an automobile).

23. (1912) 25 HARV. L. REV. 655.

24. WARREN, at 1097. See *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 424; *Brewster v. Warner*, 136 Mass. 57, 59 (1883); *Bowen v. New York Central*, 202 Mass. 263, 269, 88 N. E. 781 (1909).

The implication in Professor Warren's argument undoubtedly is that the bailor has not contracted himself out of the right to recover *full* damages for injuries to his interest in the property. Under the ordinary contract of bailment the only interest with which the bailor does part is the right of possession. If this is so, Professor Warren's position is not without merit. It is a settled principle of the law of damages that a cause of action should give only just compensation for the loss suffered.<sup>25</sup> The law gives rights of actions as a means of securing to those who have been damaged a ready means of being reimbursed for the damages done to them or their property.<sup>26</sup> Under the present state of the law, however, it is undoubtedly the rule of the majority of jurisdictions that a *bailee*,<sup>27</sup> a *finder*,<sup>28</sup> and even a *wrongful possessor*<sup>29</sup> is permitted to sue and recover damages for an injury which he has not *actually* sustained.

25. See *Murphy v. Hobbs*, 7 Colo. 541, 545, 5 Pac. 119, 120 (1884); *Baker v. Drake*, 53 N. Y. 211, 220 (1873); *Rochester Lantern Co. v. Stiles*, 135 N. Y. 209, 217, 31 N. E. 1018, 1021 (1892).

26. Mr. Justice Davis, speaking for the Supreme Court said: "The allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded." *Milwaukee R. R. v. Arms*, 91 U. S. 489, 492 (1875).

27. *United States v. Atl. Coast Lines R. R.*, 206 Fed. 190 (E. D. N. C. 1913), *aff'd*, 215 Fed. 56 (C. C. A. 4th, 1914); *Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973 (1897); *Green v. Clarke*, 12 N. Y. 343 (1855); *The Winkfield*, [1902] P. 42 (C. A.). See also (1912) 25 HARV. L. REV. 655.

28. *Armory v. Delamirie*, 1 Str. 504, 93 Eng. Reprints 664 (K. B. 1722); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904); *Bridges v. Hawkesworth*, 21 L. J. N. S. 75, 15 *Jur.* 1079 (1851).

Finders of lost property, though generally regarded as bailees, find this constructive relationship imposed by operation of law. Professor Beale argues, and with much logic, that this relationship imposed by law is lacking in the mutual assent required of the true bailment contract. Beale, *Gratuitous Undertakings* (1891) 5 HARV. L. REV. 222, 224. But see Laidlaw, *Principles of Bailment* (1931) 16 CORN. L. Q. 286, 290; Comment (1939) 8 FORDHAM L. REV. 222, 231.

However, here it is the element of lawful possession and the finder's implied undertaking to hold the property that creates the bailment. See *Foulke v. New York Consolidated R. R.*, 228 N. Y. 269, 275, 127 N. E. 237, 239 (1920); *Burns v. State*, 145 Wis. 373, 128 N. W. 937, 990 (1910). See also *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910 (1890).

The finder of lost goods does not gain title thereto as against the owner if the latter be discovered. If the true owner never appears, or has abandoned all claims to the property, the finder will become the owner possessed of full title. *Armory v. Delamirie*, 1 Str. 505, 93 Eng. Reprints 664 (K. B. 1722).

See N. Y. PENAL LAW (1881) § 1300 which makes a finder, who appropriates lost property under circumstances which give him knowledge or means of inquiry as to true owner, guilty of a larceny. See *Mills v. Erie R. R.*, 113 N. Y. Supp. 641, 645 (App. Term 1903). See also ORS. ATT'Y-GEN. (N. Y. 1934) 101.

Professor Warren agrees with the rule permitting finders to sue and recover the full value for the damage to goods in their possession. Generally, he is the only known party available to prosecute the action. Moreover, since the law imposes upon him the liability of bailee, it is quite consistent to grant to the finder the correlative right to proceed as the

Professor Warren suggests that since the bailor is the party who ordinarily has a larger interest in the chattel, the bailor may well prefer that the litigation, if any, should be conducted by his own attorney, rather than by someone chosen by the bailee.<sup>30</sup> In all fairness, this should be part of the due consideration to which the bailor, as general owner, should be entitled. If the bailor is willing that the bailee do so, all well and good. But Warren thinks that the bailor should be the judge as to who should be allowed the privilege of a full recovery.<sup>31</sup>

Professor Warren suggests that there is a possibility of further conflict in that if the bailee does recover the entire amount of damages, then there may arise some dispute, between bailor and bailee, as to the exact value of their respective interests. He says:<sup>32</sup> "The bailee has the collection in his pocket, and might well seek to use this as a bargaining asset, for if the bailor is not content with what the bailee offers, he is driven to an action against the bailee." There is this possibility, often times materializing into actual fact. The result is that the bailor may often accede to the unjust demands of an unscrupulous bailee, rather than take legal measures against such bailee.

There is the further possibility of the bailee absconding with whatever funds he has obtained as compensation for any damage to the bailed chattels. Under the *Winkfield* doctrine, if the bailee collects from the wrongdoer, he must pay over the proceeds to the bailor, less the value of his (the bailee's) interest. Professor Warren asks: but should the bailor be required to trust him to do that? One may be perfectly willing to trust another with some specific, tangible

owner of the goods against any wrongdoer and recover their full value, to hold the same for the benefit of the true owner. Warren agrees with the recovery in these cases because he says that the full value is the appropriate measure of damages, since if the owner is not ascertained the finder's interest is 100% and whether the true owner ever will be ascertained is a matter of conjecture. It is true that if the finder is going to succeed to the owner's title, it is good practice to allow him a full recovery in the first instance, rather than put him to the trouble of prosecuting two different actions for a recovery which he could have had originally in the first suit. Warren, at 1093.

29. *Anderson v. Gouldberg*, 51 Minn. 294, 296, 297, 53 N. W. 636, 637 (1892), the leading case on the subject, in which the court succinctly stated the underlying theory that "one who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner." See also *Emerson v. Thompson*, 59 Wis. 619, 18 N. W. 503 (1884).

BROWN, *PERSONAL PROPERTY* (1936) 351, announces another reason to support this rule. He states, at 351, that "To allow the defendant, in an action in which his wrongful conduct is in question, to raise doubts as to the plaintiff's title to the property, would raise collateral issues, sharply interfering with the principal point in the case—the defendant's wrongdoing." See also note 49, *infra*.

*Contra*: *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449 (1840). See HARPER, *TORTS* (1933) § 29.

30. Warren, at 1096.

31. *Ibid.*

32. *Id.* at 1097.

property. Such goods may be easily followed into the hands of third parties. But trusting another with cold cash is quite a different proposition. Money, as such, has no definite ear marks, and may not ordinarily be recovered from one who received it in good faith.<sup>33</sup> The law should be cognizant of these practical difficulties and give due consideration to the plight of the bailor by affording him the protection which the courts generally accord an owner of property.

It seems readily apparent that this state of the law is not justifiable and that some effort should be made to readjust this misfit legal principle which found its way into our law because of the dictum uttered by an English judge at the turn of this century.<sup>34</sup> Title and possession are two rights flowing from the ownership of property. They are separable rights and, in many cases, are to be found residing in different persons.<sup>35</sup> They are distinct incidents of property. Both interests should and do give rights of action for an injury to the specific chattel in question. So, the logical solution would seem to be to give both the general owner and a bailee having a special property interest an action for their respective losses. A jury can determine readily enough the interest of each party. This is done constantly in many cases where limited property interests are involved. Such was the position taken in *Claridge v. South Staffordshire Tramway Co.*, in which the English court stated: "It is true that if a man is in possession of a chattel and his possession is interfered with, he may maintain an action *but only for the injury sustained by himself*. The right to bring an action against a wrongdoer is one thing; the measure of damages recoverable in such action is another."<sup>36</sup>

However, the *Winkfield* case expressly overruled the *Claridge* case, and allowed the bailee a *full* recovery. Though this principle has attracted a large following, there have been dissenting voices. Professor Warren's theory finds

33. *Merchant's Ins. Co. v. Abbott*, 131 Mass. 397 (1881); *Stephens v. Board of Education*, 79 N. Y. 183 (1879) (the court said that from considerations of public policy and to give security and certainty to business transactions, the possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business, in good faith and for valid consideration).

34. *The Winkfield*, [1902] P. 42, 61 (C. A.). The question was not before the court but this principle was enunciated. However it has been reasserted time and again. *Green v. Clarke*, 12 N. Y. 343 (1855); *Thompson v. Fargo*, 49 N. Y. 188 (1872). However, in none of these cases does it appear that a previous action had been tried. Seemingly, the situation is one of *dicta* built up on *dicta*, and this principle has come to be accepted as a universal truth.

35. The following situations offer exemplary illustrations: *Lienor—Lienee*: *Fowler v. Gilman*, 13 Metc. 267 (Mass. 1847); *Cf. Mulliner v. Florence*, 3 Q. B. D. 484, 489 (1878). *Pledgor—Pledgee*: *White v. Allen*, 133 Mass. 423, 424 (1882); *Johnson v. Stear*, 15 C. B. N. S. 330, 143 Eng. Reprints 812, 816 (1863). *Mortgagor—Mortgagee*: *Brierley v. Kendall*, 17 Q. B. 937, 117 Eng. Reprints 1540, 1542 (1852). *Vendor—Vendee*: *Gillard v. Brittan*, 8 M. & W. 575, 151 Eng. Reprints 1168 (1841). *Bailor—Bailee*: *The Winkfield*, [1902] P. 42 (C. A.).

36. [1892] 1 Q. B. 422, 423. See (1892) 6 HARV. L. REV. 156; (1900) 13 HARV. L. REV. 411. This principle was questioned and its authority doubted in *Meux v. Great Eastern Ry.*, [1895] 2 Q. B. 387. See also (1912) 25 HARV. L. REV. 655.



support in the Massachusetts cases. In *Bowen v. New York Central R. R.*,<sup>37</sup> the court there held that "The plaintiff has, as bailee, a special property . . . and so might sue in her own name for the injury to it, and at any rate, *with the consent of the general owner*, could recover full damages therefor." With this qualification, Professor Warren is fully in accord, since, as he states,<sup>38</sup> this principle recognizes and gives due consideration to the general property right of the owner. This, he maintains, was what happened in the *Winkfield* case.<sup>39</sup> He states that there the consent of the general owners to let the bailee sue is express, or may fairly be implied, and the bailee may sue and recover full damages. So Professor Warren agrees with the *Winkfield* decision, though doubting the sweeping generality of the doctrine that a bailee may recover full damages and so prevent the bailor from bringing action against the wrongdoer.

Of course, today, with our streamlined practice which seeks to avoid long, drawn out litigation and multiplicity of suits, a single action by the bailee against the wrongdoer, thus terminating the issue in one suit is preferable. This practice is to be encouraged. However, if the bailee could only sue for his interest, this would necessitate the bringing of another action by the bailor against the wrongdoer, thus exposing the third party to the expense of defending two lawsuits, whereas previously he could have had all claims determined against him in one action.

It is a sufficient answer to this argument to say that this difficulty would not appear if the bailee obtained the bailor's consent to sue. In such case, the bailor could have no complaint, and the claim would be litigated in one action, the final determination of which would bind him.<sup>40</sup> The wrongdoer would be in no danger of the vexations accruing from separate suits being prosecuted against him, though it is not to be assumed that the courts should be over indulgent concerning any disturbances of the wrongdoer's peace of mind.

Secondly, under New York practice, there is a liberal provision for a general joinder of parties plaintiff in one action. Section 209 of our Civil Practice Act<sup>41</sup> provides that all persons may be joined as plaintiffs in one action if their claims arose out of the same transaction or series of transactions, whether the claims are joint, several or in the alternative, provided, that if separate actions were brought common questions of law or fact would arise.<sup>42</sup> It would seem that same transaction giving rise to the cause of action is the wrongful act of the

37. 202 Mass. 263, 269, 88 N. E. 781 (1909). See also *Brewster v. Warner*, 136 Mass. 57 (1883).

38. Warren, at 1098. See *Johnson v. Inhabitants of Holyoke*, 105 Mass. 80, 81 (1870); *Finn v. Western R. R.*, 112 Mass. 524, 534 (1873) (wherein the court presumed the owner's acquiescence to the suit brought by the bailee, since the owner appeared as a witness at the trial. Else the court would have ordered a new trial on the question of damages).

39. Warren, at 1097.

40. See *Green v. Clarke*, 12 N. Y. 343, 351 (1855); *Baird v. Daly*, 57 N. Y. 236, 245 (1874); *Corcoran v. Huntington Lumber & Coal Co.*, 211 App. Div. 803, 206 N. Y. Supp. 752 (2d Dep't 1924); *The Winkfield*, [1902] P. 42, 61 (C. A.).

41. N. Y. CIV. PRACT. ACT (1921) § 209.

42. *Bush v. Murray*, 209 App. Div. 563, 205 N. Y. Supp. 21 (1st Dep't 1924); *Kelso v. Cavanagh*, 137 Misc. 653, 244 N. Y. Supp. 90 (Sup. Ct. 1930).

third party. This one act creates a right in the bailor *or* bailee to sue.<sup>43</sup> If both may proceed against the wrongdoer separately, certainly both should be able to sue together, each claiming his respective interest.<sup>44</sup> If two parties may join as plaintiffs, in one complaint, on two different causes of action against a common defendant, certainly two parties can join as plaintiff in one complaint, on a question in which they are both greatly interested, and in which their interests make up the whole.<sup>45</sup> This proceeding would likewise determine the issues in one action, thus fully recognizing the aims under our present system of practice.

The approach suggested by Professor Warren appeals as being quite logical. Allow the bailee to recover for the interest of the owner only where the title holder expressly or impliedly has given his consent.<sup>46</sup>

Ordinarily, parties are willing to share the cost of a suit or avoid the financial burden entirely by permitting the other party to bring the action. But if one of the parties refuses to give his consent, it should be the wrongdoer who is to bear the burden of two suits and two separate recoveries. No complaints should be forthcoming from him, since it is his act which has given rise to the respective claims of bailor and bailee against him.

The divided interests of the owner and the possessor would be best secured by the adoption of Professor Warren's suggestion.<sup>47</sup> For it is undoubtedly anomalous that, when interests in certain property are divided between an owner and a possessor, one of the parties, against the will of the other, can recover damages for the full value of the property and thus bar the other party from any subsequent recovery against the tort-feasor.

The converse of Warren's approach has also been suggested, *vis.*, that the owner should be allowed to recover for the possessor's interest only in cases where the possessor consents.<sup>48</sup> The difficulties manifest in the arguments advanced by Warren against the bailee suing without the bailor's consent would also be found to exist where the bailor is allowed to recover the bailee's interest in the property. True, the interest of the possessor in the ordinary bailment

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43. In New York the theory seems to be one of "first come, first served". Either the bailor or the bailee may sue. Full recovery by one is a bar to any action by the other. See *Thompson v. Fargo*, 49 N. Y. 188, 191 (1872); *Baird v. Daly*, 57 N. Y. 236, 245 (1874); *Corcoran v. Huntington Lumber & Coal Co.*, 211 App. Div. 803, 206 N. Y. Supp. 752 (2d Dep't 1924).

44. *Fleitmann v. Colonial Finance Corp.*, 203 App. Div. 327, 197 N. Y. Supp. 125 (1st Dep't 1922) (where in an action for conversion of fifty boxes of gloves wherein two of the plaintiffs admittedly owned seven boxes each and the third plaintiff claimed a lien on the remaining thirty-six boxes, the court held the separate causes of action properly joined under Section 209).

45. *Star Sand & Gravel Corp. v. Marsh*, 133 Misc. 388, 232 N. Y. Supp. 235 (Sup. Ct. 1929) (where an owner and lessee of lands appropriated to public use were properly joined as petitioners in mandamus to have their damages determined and paid).

46. Warren, at 1099, 1100.

47. *Ibid.*

48. (1938) 22 MINN. L. REV. 363, 869.

will be negligible. Still, if the law would be consistent, no distinction, in principle, could properly be drawn between the two situations.<sup>49</sup>

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49. While it is not within the scope of Professor Warren's argument, which is concerned primarily with the bailor-bailee relationship, it is in order to point out that an acceptance of his thesis will necessitate a reconsideration of cases like *Emerson v. Thompson* and *Anderson v. Gouldberg*, which allow a wrongdoer in possession of personal property to recover full damages against a subsequent wrongdoer. See notes 13, 14, 29, *supra*.