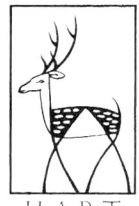
LANDMARK CASES IN THE LAW OF CONTRACT

Edited by Charles Mitchell and Paul Mitchell

Landmark Cases in the Law of Contract

Edited by

Charles Mitchell and Paul Mitchell



OXFORD AND PORTLAND, OREGON
2008

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

Hart Publishing, 16C Worcester Place, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-759-9

Typeset by Hope Services Ltd, Abingdon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

LANDMARK CASES IN THE LAW OF CONTRACT

Landmark Cases in the Law of Contract offers 12 original essays by leading contract scholars. As with the essays in the companion volume, *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) each essay takes as its focus a particular leading case, and analyses that case in its historical or theoretical context. The cases range from the early 18th- to the late 20th-centuries, and deal with an array of contractual doctrines. Some of the essays call for their case to be stripped of its landmark status, whilst others argue that it has more to offer than we have previously appreciated. The particular historical context of these landmark cases, as revealed by the authors, often shows that our current assumptions about the case and what it stands for are either mistaken, or require radical modification. The book also explores several common themes which are fundamental to the development of the law of contract: for instance, the influence of commercial expectations, appeals to 'reason' and the significance of particular judicial ideologies and techniques.

Preface

The essays in this collection, like the essays in the companion volume, *Landmark Cases in the Law of Restitution* (2006), grew out of papers presented at a symposium held at the School of Law, King's College London. We gratefully acknowledge the School's financial assistance.

As with the earlier collection, we gave authors a free choice of case, and complete freedom of method in how to approach their material. The results are predictably diverse: the cases range from the early 18th- to the late 20th-centuries, and deal with an array of contractual doctrines. Some of them call for their case to be stripped of its landmark status (*Smith v Hughes*), whilst others argue that it has more to offer than we have previously appreciated (*Suisse Atlantique*, among others).

But the essays also, perhaps surprisingly, share several common themes. Thus, mundane factual situations have frequently triggered elaborate legal responses (as, for instance, in *Coggs v Barnard*, *Pillans v Van Meirop* and *Johnson v Agnew*). Similarly, otherwise unremarkable transactions such as taking out an insurance policy (*Carter v Boehm*), hiring a theatre (*Taylor v Caldwell*), or a boat (*The Diana Prosperity*) can be thrust into the legal spotlight by external events. There is no need for the parties to be trying to achieve something novel for their contract to become the start of a landmark case.

Another striking theme is the influence of judicial personality and technique. In several cases, what made the decision a landmark was that individual judges had chosen to go beyond the arguments of counsel and develop the law as they felt appropriate. They might carry their brethren along with them (as in *Hochster v De La Tour*) or they might not (*Coggs v Barnard*). There was also a similarity about the kind of arguments used as catalysts for change. Appeals to 'reason' have flourished, perhaps inspired by Lord Mansfield's example, as have invocations of the Civil law (*Taylor v Caldwell*), even if they did not make it to the final draft of the judgment (*Coggs v Barnard*).

A further recurrent and fundamental argument, which has not been universally successful, concerns the role of contract law in facilitating commercial transactions. Some of our cases expressly acknowledge that contract law should fit commercial expectations: Lord Mansfield was probably the most famous exponent of this view (*Pillans v Van Mierop, Carter v Boehm, Da Costa v Jones*), but Lord Campbell, inspired by Mansfield, took the same line (*Hochster v De La Tour*). On the other hand, Lord Mansfield's innovative approach in *Pillans v Van Mierop* was short-lived, and the House of Lords in *Foakes v Beer* acknowledged that its decision was at odds with commercial expectations. The Court of Appeal's decision in *The Hongkong Fir* prioritised justice over

certainty, despite the commercial preference for the latter. On this fundamental question of policy the judges have been, and, we expect, shall continue to be, fundamentally divided. There can be little doubt that, as the courts continue to wrestle with this problem, the contract landscape will continue to change, and new landmarks will appear.

CHARLES MITCHELL
PAUL MITCHELL

Contributors

Michael Bridge is a Professor of Law at the London School of Economics and Political Science.

Roger Brownsword is a Professor of Law at King's College London.

David Ibbetson is Regius Professor of Civil Law at the University of Cambridge.

Michael Lobban is Professor of Legal History at Queen Mary University of London.

Catharine MacMillan is a Senior Lecturer in Law at Queen Mary University of London.

Gerard McMeel is a Professor of Law at the University of Bristol.

Charles Mitchell is a Professor of Law at King's College London.

Paul Mitchell is a Reader in Law at King's College London.

Donal Nolan is a Fellow in Law at Worcester College Oxford.

John Phillips is Professor of English Law at King's College London.

Warren Swain is a Lecturer in Law at the University of Durham.

Stephen Watterson is a Senior Lecturer in Law at the University of Bristol

Contents

1

Coggs v Barnard (1703)

DAVID IBBETSON

NO APOLOGY IS needed for the inclusion of *Coggs v Barnard*[1] in a volume of leading cases in the law of contract. The judgment of Holt CJ was described by Francis Hargrave as 'a most masterly view of the whole subject of bailment'[2]; Sir William Jones was happy to treat his *Essay on the Law of Bailments* 'merely as a commentary' on the decision[3]; and its canonical status as the *fons et origo* of the rules relating to the standard of care demanded of a bailee was thoroughly established by 1837, when John William Smith published the first edition of his *Leading Cases in the Common Law*:

> The case of *Coggs v Bernard* is one of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord *Holt* contains the first well ordered exposition of the English law of bailments.[4]

But lurking behind Smith's description of it is the suspicion, uncomfortable to the Common lawyer, that Holt CJ's exposition of the law involved something more radical than the articulation of principles which were already in some way immanent in the earlier case-law. Its status as a leading case depends not only on its formulation of rules which have now survived for three centuries, but also on its scouring away of a mass of confusing material which had built up over the previous 400 years or more.

The present paper is an attempt to understand how this occurred. It will first examine and contextualise the arguments of counsel and the three puisne judges, Gould, Powys and Powell JJ, showing how all of these were framed in terms of the case-law as it had developed over the previous two or three centuries. That case-law was very messy, and substantially incoherent; so too,

[1] *Coggs v Barnard* (1703) 2 Lord Raym 909, 92 ER 107; 3 Lord Raym 163, 92 ER 622; 1 Salk 26, 91 ER 25; 2 Salk 735, 91 ER 613; 3 Salk 11, 91 ER 660; 3 Salk 268, 91 ER 817; 1 Com 133, 92 ER 999; Holt 13, 90 ER 905; Holt 131, 90 ER 971; Holt 528, 90 ER 1190; B[ritish] L[ibrary] MS Add 34125 111, L[incoln's] I[nn] MS Coxe 64 39, 56, LI MS Hill 52 10*v*

[2] F Hargrave (ed), Coke on Littleton (London, 1775) 89b fn.3.

[3] Sir W Jones, *An Essay on the Law of Bailments*, D Ibbetson (ed), (Bangor, Welsh Legal History Society, 2007) 59.

[4] JW Smith, *A Selection of Leading Cases on Various Branches of the Law* (London, A Maxwell, 1837) 96.

therefore, were the arguments of counsel and the puisnes. Holt CJ approached the question very differently, giving less weight to the earlier authority and instead choosing to bring a measure of coherence to the law by sub-dividing the types of bailment and fitting them into a principled framework. The paper will focus not so much on what he did as on how he did it. Surviving in the British Library is Holt's own draft of his judgment as it was worked and reworked,[5] and this will be compared with the report of the judgment as it appears in print in Lord Raymond's Reports.[6]

The facts of the case, deducible from the pleadings,[7] are more or less unproblematic. The defendant, William Barnard, undertook to carry several barrels of brandy for the plaintiff, John Coggs, from a cellar in Brooks Market, Holborn, to another in Water Street, some half a mile away just south of the Strand. In the course of unloading into the Water Street cellar one barrel was staved, and brandy spilled out of it onto the roadway. According to the pleadings the amount lost was 150 gallons, though the version reproduced by Salkeld refers to 150 bottles. It seems likely that the latter is a more accurate reflection of the actual amount lost: the market price of brandy at this time was in the region of 10 shillings per gallon,[8] but the damages were ultimately assessed at only £10, rather closer to the value of 150 bottles. Faced with this loss, Coggs brought an action on the case against Barnard, alleging that he had undertaken to carry the barrels but, through his negligence, had caused one of them to be damaged and the contents spilled.

It is possible to penetrate a little further into the circumstances surrounding the case by trying to identify the dramatis personae, though, since the accident behind the litigation was so utterly commonplace that it has left no trace on the historical record, any conclusion must be very tentative. We might plausibly guess that the plaintiff was the goldsmith banker John Coggs, whose business was run from the King's Head on the Strand, just on the south-west corner of Chancery Lane.[9] He would have been sufficiently wealthy to have been pos-

[5] BL MS Add 34125 111. There is a neat copy of this text in BL MS Add 35981 122v (with a note that the volume had been lent to Buller J). The latter copy is of assistance in the decipherment of the former, which is not always easy to read, but the former—with its erasures, insertions and interlineations—is indispensable in the reconstruction of Holt's reasoning processes.

[6] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 92 ER 107, almost certainly the work of the Inner Templar Herbert Jacob (see BL MS Harg 66 44 (attribution at 1v), Harvard Law School MS 2136 81 (attribution of volume)). Jacob and Raymond lived 'in great intimacy' as student lawyers and shared reports: JH Baker, *English Legal Manuscripts in the United States of America. Part II: 1558–1902* (London, Selden Society, 1990) 315, on Philadelphia Free Library MS LC 14.66.

[7] PRO KB 122/5 m435 (in JH Baker and SFC Milsom, *Sources of English Legal History* (London, Butterworths, 1986) 370); *Coggs v Barnard* (n 1 above) 3 Lord Raym 163, 92 ER 622; 2 Salk 735, 91 ER 613 (with slight variations).

[8] JE Thorold Rogers, *A History of Agriculture and Prices in England* (Oxford, Clarendon Press, 1866–1902) 5.450, 6.421, 7(1).353.

[9] A Heal, *The London Goldsmiths* (Cambridge, Cambridge University Press, 1935) 127; FGH Price, *Handbook of London Bankers* (London, Simpkin, Marshall, Hamilton, Kent & Co, 1890) 39–40; HC Shelley, *Inns and Taverns of Old London* (London, 1909) 92–3.

sessed of several casks of brandy,[10] and Water Street, where the accident occurred, would have been only a couple of minutes walk from his place of work. The defendant, William Barnard, is less easy to identify, but he may well have been the fishmonger's porter of that name, of the parish of St Dunstan's in the East, who died in February 1706.[11] If so, he was literate enough to be able to sign his own will. He was hardly rich, but was by no means a pauper: he left legacies of 20 shillings to each of four siblings and a niece, with a further one shilling to another niece. The rest of his estate went to his widow. We are not told what its value was, but it was clearly sufficient for him to enjoin her in due time to pay out £10 to provide an apprenticeship for one William Turner, a child for whom he seems to have assumed guardianship obligations. There are hints in the reports of *Coggs v Barnard* that he had servants who might have been responsible for the accident, so it may be that he was in business in a small way. It is easy to see *Coggs v Barnard* as a case in which a substantially wealthy man was suing a relatively poor one, but Coggs himself may have been beginning to fall into financial difficulties. Within a few years his goldsmith's business had failed and he and his partner had been adjudged bankrupt.[12] Moreover, in Hilary Term 1703 process was served on him by the former manager of a brass wire works, of which he was the principal partner and treasurer. After several years of litigation this resulted in an award in the sum of over £5000.[13]

The accident was unremarkable, the parties unremarkable. When the case came up before Holt CJ at the London Guildhall early in 1703, there is nothing to suggest that it was seen as anything other than the most routine piece of litigation. The trial duly took place, the jury found a verdict for the plaintiff, and damages were assessed at £10. The defendant, hoping no doubt to be able to avoid having to pay this sum, raised a motion in arrest of judgment, presumably on the technical ground that the plaintiff's claim had been improperly pleaded. Thus it was that the leading case was conceived.

We have only a very scrappy note of the arguments of counsel,[14] but we can deduce from it that there were three relevant issues. First was whether the plaintiff's count should have alleged either that the defendant had received some consideration, or alternatively that he was a common porter—ie a person who made his living as a porter—in which case consideration would be presumed. If it were held that such an allegation was necessary, the second question would

[10] More likely, since the quantity of brandy would have been prodigious even for most heroic of dypsomaniacs, he might have been buying it other than in a personal capacity. He was a former Warden of the Goldsmiths' Company and a member of its Court: WT Prideaux, *A List of the Wardens, Members of the Court of Assistants and Liverymen of the Worshipful Company of Goldsmiths since 1688* (London, Arden Press, 1936) 2.

[11] Lambeth Palace Library, VH/95/104 (original will), VH/94/4/924 (will admitted to probate), VH/98/3 f.76v (note of probate).

[12] Stat 8 Anne c 28 (1709).

[13] *Ball v Coggs* (1710) 1 Brown PC 140, 1 ER 471; *Ball v Lord Lanesborough* (1713) 5 Brown PC 480, 2 ER 809.

[14] LI MS Coxe 64 39.

then arise: whether, properly analysed, the count did in fact contain sufficient indication of consideration or something equivalent to it. The third issue was distinct: whether the defendant was strictly liable for damage or liable only for his negligence. Although formally unrelated to the earlier points, there was a measure of overlap in substance, since on some lines of argument the appropriate test for liability might have depended on whether or not the defendant had received consideration. The issues were not easy to resolve but, importantly, the assumption behind the arguments of counsel was that they should be resolved by reference to authority and principle. There is nothing to suggest that any attempt was made to engineer a break with the past and to put the law of bailments on a new footing.

To understand the first argument it is necessary to sketch in a bit of history. The action on the case had emerged in the middle of the 14th century as the appropriate action to frame a claim based (inter alia) on the misperformance of a contract; until about 1500 it was not appropriate for cases of contractual non-performance.[15] In the early years of the 16th century this restriction was removed, and, taking on the name of *assumpsit*, the action on the case became the normal form of action to complain of any breach of a contract not under seal.[16] Although the form of pleading was the same for misperformance and for non-performance—an allegation that the defendant had assumed and promised to do something but had then either done it badly or not done it at all—by the end of the 16th century it was coming to be recognised that the two types of claim were analytically distinct. This was very clear from *Powtney v Walton* in 1597,[17] where it was held that in an action of *assumpsit* for non-performance it was essential to allege that there had been good consideration for the promise, but in an action for misperformance there was no such requirement. In effect, the former was a claim in contract and the latter a claim in tort.[18]

By the time of *Coggs v Barnard*, it might have been thought, the suggestion that there was a requirement of consideration in a claim for contractual misperformance should have been unarguable. *Powtney v Walton* stood as authority against it; Year Book cases pointed to the acceptability of the action without any consideration where there had been some misfeasance rather than pure nonfeasance[19]; and precedents without any allegation of consideration could be found in the printed Register of Writs.[20] Holt CJ, though, claimed that 'by long and antient practise' these cases had not been followed[21]; and in the leading case of misper-

[15] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 1999) 126–30.

[16] *Ibid* 130–51.

[17] *Powtney v Walton* (1597) 1 Ro Abr 10 (Baker and Milsom, *Sources of English Legal History* (n 7 above) 370).

[18] *Carter v Fossett* (1623) Palmer 329, 81 ER 1107 (Jones J): when the claim was in contract it would lie against executors, when in tort it would not.

[19] Baker and Milsom, *Sources of English Legal History* (n 7 above) 358–69.

[20] *Registrum Omnium Brevium* (1687) 110.

[21] BL MS Add 34125 111v.

formance by a carrier, *Mors v Slue*—whose pleadings were said to have been drafted by the leading pleader of the time—it was noted that reference had been made explicitly to the payment which was to be received for the carriage.[22]

Counsel for the plaintiff probably thought that he was on solid ground on this point, all the more so since the defendant's plea of not guilty (rather than *non assumpsit*) might have suggested that he too had accepted that the claim was tortious rather than contractual. Drawing the apparently orthodox distinction of *Powtney v Walton*, he argued, 'If it [the claim] had been founded upon the contract it might have been an objection, but is upon the neglect'.[23] Holt CJ, intervening in the argument, was less convinced: there was no reason why the count should not have followed the normal course and alleged that there had been some payment made by way of consideration. One possible response to this was that the consideration did not have to be mentioned expressly since it was implied: where the defendant was a professional it would be supposed that he was not acting gratuitously, and he could bring a quantum meruit claim even if no consideration had been agreed. This had been held to be so in the case of common (ie professional) carriers,[24] and by parity of reason it would have been a good argument if the defendant was a common porter. There is some suggestion (by Holt CJ, once again intervening in the argument) that it had been found at the trial that he was, but in the argument in arrest of judgment this could only have been relevant if it appeared as a matter of record or could be deduced from the jury's verdict. Holt seems to have hinted that the verdict in the plaintiff's favour must indicate that the defendant was a common porter,[25] but it is not easy to see how such an inference could have been drawn, and it may be that we misunderstand (or the reporter misunderstood) the point that was being made. In any event, no more is heard of it.

Counsel's second response to the objection proved to be more fertile. He argued that the pleadings did in fact show that there had been a good consideration:

> [B]e it upon the contract or neglect it is a good [count] for whenever is a trust reposed to do an act the law joins [?] a consideration for he shall be payd according to a quantum meruit.[26]

This appears to have been intended as an extension of his previous argument: just as a common porter would have had a quantum meruit for his labour if no consideration had been agreed, so would any person who had been entrusted with a task. On the face of it this was unsustainable, since it assumed that nobody would ever agree to do something for another out of simple generosity[27]; but the use of

[22] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 920; 92 ER 107, 114.
[23] LI MS Coxe 64 39.
[24] The case cited was *Nicholls v More* (1661) 1 Sid 36, 82 ER 954.
[25] LI MS Coxe 64 39, 39v.
[26] LI MS Coxe 64 39.
[27] The point was perhaps made by Holt CJ (LI MS Coxe 64 39, 39v), seemingly distinguishing between carriage by a common porter and carriage by a non-professional out of kindness; but the brief note in the manuscript is very difficult to follow.

the language of trust in formulating it provided the judges with the opportunity to use their imaginations in manipulating the law in the plaintiff's favour.

Leaving to one side the judgment of Holt CJ, it is possible to see the three puisne judges responding in different ways to these arguments. Powys J appears to have followed the primary argument of the plaintiff's counsel that the claim was not based on the contract but on the neglect. The rather lapidary note of his judgment reported by Lord Raymond—'Powys agreed upon the neglect'[28]—is not especially helpful, but it points in this direction; and according to a manuscript report, he referred to the precedents cited from the Register of Writs as focusing on the defendant's default and drew the orthodox distinction found in the Year Books between cases of non-performance which were not actionable and cases of misperformance which were.[29] Only a little elaboration of the latter point is needed to focus it sharply onto *Coggs v Barnard*: cases of non-performance were not actionable in the absence of consideration, while in cases of misperformance there was no such requirement. Since this was a case of misperformance, it followed that the lack of an allegation of consideration was not fatal.

Gould J was more hesitant, but the thrust of his judgment was on rather the same lines, drawing the distinction between misperformance and non-performance. Whether or not the defendant was a common tradesman, where the goods were lost or damaged through his gross neglect[30] he was liable even if he had not received any consideration. Unlike Powys J, though, he provided a reason for this liability—the fact that a 'particular trust' had been reposed in him.[31] The language of trust is the same as that in the plaintiff's counsel's argument, but its function is now completely different. In argument, trust had been used to ground the defendant's right to payment, and hence the conclusion that there had been good consideration, whereas for Gould J it was a self-standing justification for the imposition of what we would regard as tortious liability.

The third puisne, Powell J, rejected the argument that the claim was based on the neglect. There were indeed cases in which the neglect rather than the undertaking was stressed,[32] but in others the weight was put on the undertaking.[33] Faced with this indeterminacy in the case-law he turned to principle. Here he could be more dogmatic: the gist of the actions lay in the undertaking.[34] Still, though, the distinction could be drawn between cases of non-performance and cases where the defendant had taken goods into his custody; only in the former would consideration be required. Like Gould J, he justified liability in the absence of consideration by picking up the language of trust, but he used it in

[28] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 910; 92 ER 107, 108.

[29] LI MS Hill 52 10v.

[30] For the significance of the difference between neglect and gross neglect, see below 14–16.

[31] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 92 ER 107.

[32] Citing *Waldon v Marshall* YB M 43 Edw III 33 pl.38.

[33] YB H 48 Edw III 6 pl.11; YB H 19 Hen VI 49 pl.5; YB H 2 Hen VII 11 pl.9; YB P 7 Hen IV 14 pl.19.

[34] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 910; 92 ER 107, 108.

yet another way. Drawing the analogy with warranties, which were actionable without any consideration,[35] he argued that it was only because the plaintiff had relied on the defendant's warranty—presumably that he would take care—that he had trusted the defendant with his property:

> [W]hen I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action.[36]

For all their differences in nuance, it is not difficult to see that the three judgments on this point are built upon the arguments addressed to them by counsel as well as being well grounded in Common-law authority.

The other point raised in the argument in arrest of judgment was specific to the law relating to bailments—the standard of care to be demanded of the bailee. The law in this area was in an extraordinary mess, but perhaps excusably so since the problem was exceedingly intractable.[37] Fundamentally, the problem arose because of the clash of two different approaches to liability. From the middle of the 14th century, it was clearly established that liability in trespass on the case—which we may safely treat as unequivocally tortious at this time—depended on there having been some fault on the part of the defendant,[38] though in cases involving bailments fault was commonly linked not to any objective standard of behaviour but to the failure of the bailee to take the same care of the bailed property as he did of his own goods.[39] From the middle of the 14th century, by contrast, contractual liability was seen as strict, in the sense that the defendant was liable if he had failed to achieve the result contracted for unless he was excused by one of a relatively limited set of recognised circumstances (roughly speaking, act of God, act of the plaintiff, and act of a third party against whom the defendant could not himself have had any action).[40] In actions against bailees these rules clashed. So long as the forms of action could be mapped onto the divide it perhaps did not matter: in an action on the case the defendant would be liable only if he had been at fault; in detinue or account or some other action which could be seen as contractual, the strict liability rule would be applied unless the parties had agreed on something else.[41]

In the 16th century, things had got more complicated. The primary cause of this was the extension of the action on the case to contractual non-performance. As has been seen above, this caused claims for misperformance and non-performance to flow together[42]; and as *assumpsit* adopted the strict liability of

[35] R Aston, *Placita Latine Rediviva* (London, 1661) 35–7.

[36] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 911, 92 ER 107, 108.

[37] I have attempted to analyse it in my edition of Sir W Jones's *Essay on the Law of Bailments* (n 3 above) 74–95.

[38] Ibbetson, *A Historical Introduction to the Law of Obligations* (n 15 above) 62–3.

[39] *Bowdon v Pelleter* (1315) YB P 8 Edw II (41 SS) 136; *Veel v Wygryme* (1388) YB H 11 Ric II (AF) 163. Ibbetson (ed), *An Essay on the Law of Bailments* (n 3 above) 85.

[40] Ibbetson, *A Historical Introduction to the Law of Obligations* (n 15 above) 91–4.

[41] *Veel v Wygryme* YB H 11 Ric II (AF) 163; YB M 9 Edw IV 40 pl. 22; YB T 3 Hen VII 4 pl.16.

[42] Above, 4.

mediaeval law there was a tendency for the bailee's liability to be seen as strict.[43] Pulling in the opposite direction, around 1530 Christopher St German had attempted to give more shape to the bailee's liability in his text, *Doctor and Student*. This had involved his borrowing heavily from Roman law, directly or indirectly, and framing the default rule of liability in terms of the bailee's fault; if the parties wanted a different rule they should agree it expressly.[44] Cutting across these two competing rules was the question whether it made any difference that the bailee was being paid. There were several distinct reasons why this might be relevant: because bailees who were getting paid should adhere to a higher standard of care, as Roman law had demanded; because it was only if there was consideration that the contractual default rule of strict liability could be applied; or because the law could give effect to a special term imposing liability without fault only if it had been agreed to by contract, and therefore only if some consideration had been given for it. In addition, there arose the evidentiary question of what exactly constituted an agreement on a special term in cases where there was no written contract. The matter was discussed in two inconclusive cases in the late 16th century, *Woodlife v Curtis*[45] and *Mosley v Fosset*,[46] but it was only in *Southcote v Bennet* in 1601 that it received a full airing.[47] Here it was argued that the distinction should be drawn between cases where the defendant had simply undertaken to look after a thing and cases where he had undertaken to keep it secure, to look after it *salvo et secure*. This might have made good sense as a matter of logic, the undertaking to keep the thing secure being interpreted as a contract to achieve a result; but it was practical nonsense. In the absence of a written agreement, how could a jury sensibly decide whether the bailee had agreed to keep the thing or had agreed to keep it *securely*? The King's Bench therefore rejected the distinction, imposing the default rule of strict liability on all bailees.[48] *Southcote v Bennet* was reported in Coke's *Reports*, and hence gained authoritative status, and this rule of strict liability was incorporated in his *Commentary on Littleton* with approval.[49]

Southcote's case was cited in argument in *Coggs v Barnard*, and although the note is too brief at this point to be certain what was said about it, it is not too

[43] Nearly all of the evidence for this comes from actions about the carriage of goods by sea, and it may be that the marine insurance market favoured clear liability rules against the background of which the parties could allocate the risks for themselves.

[44] C St German, *Doctor and Student*, Book 2 chap 38, TFT Plucknett and JL Barton (eds), (Seldon Society vol 91, London, 1974) para 2.38, 259–61.

[45] *Woodlife v Curtis* (1597) Moo 462, 72 ER 696; Owen 57, 74 ER 897; Ro Abr *Action sur le Case* C (4).

[46] *Mosley v Fosset* (1598) Moo 543, 72 ER 746, Harvard Law School MS 1004c 3; Cambridge University Library MS Dd 8.48 19; PRO KB 27/1347 m.83.

[47] *Southcote v Bennet* (1601) 4 Co Rep 83b, 76 ER 1061 (from BL MS Harl 6686 f.445v); Cro El 815, 78 ER 1104; JH Beale, 'Southcott *v* Bennett' (1899) 13 *Harvard Law Review* 43 (from Thomas Coventry's report); PRO KB 27/1362 m.500d.

[48] Strictly speaking, perhaps, the rule was imposed on all *contractual* bailees, but the distinction between contract and tort did not arise on the facts of the case.

[49] Co Litt 89b (n 2 above).

difficult to guess. Plaintiff's counsel would have wanted to follow the decision, thereby imposing a rule of strict liability on the defendant; defendant's counsel would have urged the court to depart from it. Each of the puisne judges dealt with the point by distancing himself from *Southcote's case*. For Gould J it was 'a hard case indeed', and 'no man that was not a lawyer' would think to insist on a special term[50]; for Powys J it was unreasonable and not warranted by the authorities[51]; and for Powell J the decision was 'hard' and not justified by the previous authorities, and it was unreasonable to expect the ordinary bailee to know that he had to insist on a special term if he was not to be strictly liable for loss or damage.[52] If *Southcote's case* was not to be followed, and hence strict liability rejected, what, then, was the rule? Powys J, so far as we can judge from the brief report, was silent on the point. Gould J argued that the bailee should normally be liable only for gross neglect, but if there was a special term it would not be unreasonable to make him liable for any loss flowing from his 'miscarriage' or his ordinary neglect.[53] Whether, by the latter, he meant strict liability or liability for some lesser degree of fault is unclear. Powell J simply adopted the rule which had been argued for but rejected in *Southcote v Bennet*, that where a bailee agreed to keep goods safely he would be liable for any loss or damage unless he could bring himself within one of the excusatory circumstances[54]; but in the absence of any special undertaking he would not be so liable.[55] We are not told what the liability would be in the normal case.

The reports at this point are clearly unsatisfactory. We know little more than that *Southcote's case* was disapproved, and the evidentiary implications of this are not worked out. As to the rule applicable in the absence of a special term, only Gould J's view is known. And none of the three tells us how their reasoning should apply on the facts of *Coggs v Barnard* itself, though we might safely guess that the effect of each of their judgments was that the plaintiff should win.[56]

If all that remained to us were the notes of the judgments of the three puisnes, we might guess that *Coggs v Barnard* would have sunk with hardly a trace. The determination that the claim lay without any allegation either that the defendant had received consideration or that the defendant was a common tradesman—though perhaps important in its time—simply reaffirmed the rule which had been laid down clearly in *Powtney v Walton*; and the disapproval of *Southcote v Bennet* would have done no more than clear the way for a later court to define more precisely in what circumstances the bailee would be liable.

[50] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 92 ER 107.
[51] LI MS Hill 52 10v; cf *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 914; 92 ER 107, 110.
[52] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 911–12; 92 ER 107, 109.
[53] *Coggs v Barnard* (n 1 above) 2 Lord Raym 909, 909–10; 92 ER 107, 107–8.
[54] Above, 10.
[55] *Coggs v Barnard* 2 Lord Raym 909, 911–12; 92 ER 107, 108–9.
[56] A brief note in Holt CJ's draft judgment refers to Gould J being on the side of the plaintiff: BL MS Add 34125 111, 112v.