COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON

MAR 15 1938

A-89545-O.M.

MAR 15 [redacted]

Chief, Claims Division:

Returned herewith are the papers transmitted with your memorandum of October 11, 1937, concerning the claim of Hopton Brothers for $180 as reimbursement for 12 wheelbarrows and 1500 feet of scaffold lumber loaned to the Civil Works Administration for use on a project at the Tennessee Industrial School, Nashville, Tennessee, and never returned. There has been noted the memoranda with the file as to the confusion in the Claims Division respecting the application of decisions dealing with claims of this character.

In 8 Comp. Gen. 448, 451 it was said:

"The involved contract with the claimant clearly was one of bailment for hire imposing upon the Government the obligation to return the coal barge to the contractor in as good condition as when received, natural wear and tear excepted, and failing to do this to respond in damages to cover any injuries to said barge resulting from the fault of the bailee."

and it was held that the appropriation available for the rent of the barge was available to reimburse the bailor the cost of repairs required by the rental contract to be made to meet the Government contractual obligations thereunder. See, also, 16 Comp. Dec. 68; 18 id. 149; 24 id. 606; 27 id. 299. Cf. 7 Comp. Gen. 653.

Following the principles of that decision, the allowance of claims or the preaudit certification of vouchers has been directed in cases where the evidence satisfactorily established that the loss of or the damage to the bailed property was proximately caused by the failure of the Government to exercise that degree of care which the bailment contract imposed as an express or implied obligation to protect the property and return it unimpaired. See, for example, the following cases during the past year: A-83396-O.M., February 20, 1937 (negligent breaking of glass top for desk under post office lease); A-84755-O.M., April 3, 1937 (rented motion picture film burned through negligence of operator); A-85392-O.M., April 27, 1937 (rented jackhammers stolen through negligence of WPA watchman); A-84124-O.M., June 9, 1937 (airplane destroyed in test flight due to negligent failure of Government officers to give pilot necessary instructions which were in their hands); A-86789-O.M., June 19, 1937 (rented typewriter stolen through negligence of WPA project supervisor leaving it unguarded in an open corner of the City Hall after completion of the

project); A-87077-O.M., July 20, 1937 (loaned signal lights damaged in removal through negligence in directing their removal); A-89132-O.M., October 30, 1937 (rented barge damaged by marine worms through negligent failure to return the barge for copper painting as agreed); A-90929-O.M., January 12, 1938 (agreement to pay for burned telephone and wires in WPA office not questioned in view of stated negligence causing fire).

On the other hand, reimbursement has been denied in cases where the record did not satisfactorily establish that the loss or damage was proximately caused by the Government's failure to exercise the care required by the bailment contract. It was said in 15 Comp. Gen. 929, 930:

"Under these conditions the Government was not an insurer of the property, but was merely a bailee for hire and as such was responsible only for ordinary care of the equipment. (See 6 Corpus Juris 1121, et seq.) It does not appear from the circumstances stated in your letter that the Government was remiss in its obligations in this respect, and * * * there appears no legal obligation on the part of the United States to pay the contractor any amount for the replacement of the two stolen loud speakers needed to maintain satisfactory operation of the equipment."

See, also, 19 Comp. Dec. 131; 26 id. 70; 1 Comp. Gen. 192; 5 id. 253; id. 557.

Following that principle, reimbursement was denied in A-81497, February 9, 1937 (rented surveying equipment destroyed by a fire at a CCC Camp not shown to have been negligently started); A-83022, February 8, 1937; id. December 7, 1937 (rented typewriter disappeared from C.W.A. office under conditions showing no failure to exercise ordinary care in keeping and using the property); A-83227, February 11, 1937 (same as last case cited except that evidence of ordinary care not so free from doubt, but on the whole record negligence not established); A-85053, April 21, 1937 (piano rented or loaned to W.P.A. destroyed by flood, with no showing of fault on part of Government); A-86153-O.M., May 21, 1937 (rented typewriter destroyed by fire which completely destroyed W.P.A. administration building, no negligence shown); A-86656-O.M., June 12, 1937 (rented transit in full view on open road struck and damaged by automobile driven by private citizen, no negligence by Government shown); A-87416, July 27, 1937 (rented canvas wall damaged by windstorm, no evidence of negligence on part of employees of United States); A-87482, July 26, 1937 (rented chairs reported broken while being used for purpose for which rented, with no evidence of negligence); A-87757-O.M., August 3, 1937 (rented transit stolen, no evidence of lack of due care, the transit being kept in a locked tool box); A-90493-O.M., December 14,

1937 (hand forged frame of a loaned dynamometer broken while in use by Government, there being no evidence of any carelessness on the part of workmen or other representatives of the Government, the break apparently being caused by fatigue of the material from prior use).

There should be no confusion as to the legal principles involved in such cases. The difficulty comes in determining whether the record in a particular case justifies a determination that the Government did not exercise the degree of care required by the bailment contract. This depends on the facts of the particular case and the obligations under the bailment contract in that case, and no general rule can be laid down to govern these varying factors. Many cases fall clearly on one side or the other of the line, while others are so close that they might with good reason be determined either way. Generally in suits by bailors for loss or damage of bailed property, the burden is on the bailee to show that the loss or damage was not caused by any failure on his part to exercise the requisite degree of care, 6 C.J. 1158, and cases cited, but in the settlement of claims and the preaudit of vouchers by this office on ex parte records it cannot be assumed that the Government has no defense because the exercise of the requisite degree of care is not affirmatively established. The burden is on claimants to establish their claims before this office, and allowance in cases such as these is not warranted unless the record may be taken as reasonably establishing that the loss or damage of the bailed property was proximately caused by the failure of the Government to exercise the degree of care imposed by the bailment contract. If there be reasonable doubt whether the loss or damage was so caused, the claim should be disallowed, or, if the question be close, the matter should be submitted here for instructions.

In cases where the bailment is for the sole benefit of the bailee, as in the present case where the property was loaned to the Government, there is an implied contractual obligation that the bailee will exercise extraordinary care to protect and return the property. But even in such cases there must be a showing of some failure on the part of the Government to exercise that requisite degree of care to justify allowance by this office of claims for loss or damage of the property. Thus in A-85053, April 21, 1937, supra, where a piano was destroyed by a flood, it was said in denying reimbursement: "* * * In the absence of a special contract, a bailee--even under a gratuitous bailment--is not an insurer of the thing bailed and is not responsible for damages or losses arising from an unforeseeable accident or under circumstances which might not reasonably be foreseen and provided against. * * *", whereas an allowance was directed in A-87077-O.M., July 20, 1937, supra, where signal lights loaned to the Government had been damaged by a flood but were further damaged by careless removal due to a mistaken understanding on the part of an officer of the Bureau of Air Commerce that they were of no value.

In A-87577, August 4, 1937, where a trailer and trailer hitch were loaned to the Government and the trailer was damaged because of a break in the trailer hitch; in A-88045, August 13, 1937, where an excavator was used without permission of the owner but with the consent of the owner's employees and certain repairs were required after such use; and in A-88564, February 23, 1938, where drill pipe and special couplings loaned to the Forest Service for use with rented well drilling equipment became stuck and were lost in the well in an attempt to remove them, the facts of record did not establish that the damage or loss of the bailed property was caused by any failure to exercise the required degree of care, but they did not establish that due care was used and in view of the extraordinary degree of care required under such gratuitous bailments the circumstances involved in such cases appeared sufficient to warrant reporting the claims to Congress pursuant to the act of April 10, 1928, 45 Stat. 413. It was said in those cases that there was no agreement for the payment of damages for loss or injury of the property and no appropriation available for the payment of such damages. But in such cases of bailment for the sole benefit of the bailee there is an implied contractual obligation to exercise a high degree of care to protect and return the property, similar in legal effect to the implied obligation in bailments for hire to exercise ordinary care, see 6 C.J. 1110-1111, and where the record may be taken as establishing a failure to meet such contractual obligation there is on principle no basis for distinction between cases of bailment for the sole benefit of the bailee and cases of bailment for hire so far as there is concerned the availability of the appropriation to pay for the loss or damage of the bailed property due to such failure. Accordingly, the statements in the cases reported to Congress as to nonavailability of appropriations should be viewed as going no further than that appropriations are not available to pay for losses not established as contractual obligations. See 5 Comp. Gen. 253. The statement in A-87416, July 27, 1937, supra, where a rented canvas wall was damaged by a windstorm, that even if the United States were liable under the rental agreement, payment could not be made because the appropriation was not available, was not necessary to the decision, and, together with any statement to the same effect in other decisions, should be disregarded to the extent of conflict with the principles of 8 Comp. Gen. 448 and similar decisions cited, supra. Decisions holding that while property may be repaired where required for further use by the Government but that appropriations are not available to pay the cost of repairs upon return of the property should be distinguished on the same basis, that is, that the appropriation is not available unless there be established a contractual liability to make good the damage, by reason of some failure to exercise the requisite degree of care imposed as an express or implied contract obligation.

This rule, which has been established at least since 16 Comp. Dec. 68, or almost thirty years, that appropriations are available to pay contractual obligations for loss or damage of bailed property, is not limited by special legislation authorizing the settlement of certain classes of claims for loss or damage of private property irrespective of contractual liability. Thus, for example, the act of January 31, 1931, 46 Stat. 1052, authorizing the Secretary of Agriculture to reimburse owners for loss, damage, or destruction of horses, vehicles, and other equipment obtained by the Forest Service for the use of that service, in effect expands the general rule so as to permit reimbursement in that particular class of cases without a showing of negligence or failure to take due care of the bailed property; the act of May 27, 1930, 46 Stat. 387, authorizing the Secretary of Agriculture to reimburse owners of private property for damage or destruction thereof caused by employees of the United States in connection with the protection, administration, or improvement of the national forests, does not make either a contractual relationship or negligence a condition precedent to reimbursement; and while the terms of the act of December 28, 1922, 42 Stat. 1066, conferring on the heads of departments and establishments authority to consider and certify to Congress claims not in excess of $1000 for damages to or loss of private property caused by the negligence of any officer or employee of the Government acting within the scope of his employment, are broad enough to include claims for negligent loss or damage of bailed property, contrary to an express or implied contractual obligation, such contractual relationship is not a prerequisite under the statute, the statute being intended primarily to take care of claims sounding in tort for which the law provided no other remedy.

In A-66271-O.M., February 24, 1936, where a claim for negligent injury to bailed property was presented solely as a claim under the said act of December 28, 1922, but was transmitted here for settlement, a disallowance of the claim was directed, the claimant to be advised that his claim was for administrative consideration under that act. In this connection it may be remarked that for negligent loss or injury of bailed property the bailor has an election to bring his action either ex contractu on the contract obligation, express or implied, or ex delicto for the negligent injury, and having elected to pursue his remedy under the act of December 28, 1922, as for negligent injury, the claim appeared to be one not properly for allowance as a contract obligation under the appropriation. In other cases, claims for loss or damage to bailed property have been transmitted to the head of the administration establishment concerned suggesting consideration under the said act of December 28, 1922, if negligence was established. See A-59074, December 29, 1934, A-60274, April 6, 1935; A-74642, May 20, 1936. While the action taken in those cases appears to have been justified by the broad term of the act of December 28, 1922, such procedure is not required under the principles of 8 Comp. Gen. 448, and similar decisions cited supra, and need not be followed in the absence of special circumstances, such as doubt of a contractual obligation, making advisable

the administrative consideration of the claim under that statute.

Summarising:

1. If otherwise correct, claims for damage or loss of bailed property may be allowed under appropriations available for rental or procurement of such property, following the principles of 8 Comp. Gen. 448, and other decisions cited, supra, where the record satisfactorily establishes a failure to exercise the degree of care required by the express or implied terms of the bailment contract, whether bailments for hire or bailments for the sole benefit of the Government.

2. Such claims should be disallowed following the principles of 15 Comp. Gen. 929, and similar decisions cited, supra, where the record does not establish a failure to exercise the required degree of care under the bailment contract.

3. Doubtful claims, with your recommendations thereon, should be submitted here for consideration, including:

(a) Claims where there is doubt as to whether the record may be taken as establishing failure to exercise due care;

(b) Claims where the record does not establish failure to exercise due care, but where the presumption of such failure or other circumstances would appear to warrant a report of the claim to Congress pursuant to the act of April 10, 1928, 45 Stat. 413; omit

(c) Claims where a failure to exercise due care may be established, but the contractual obligation is not established, or where otherwise the circumstances would appear to warrant referring the claim to the head of the department or establishment concerned for consideration under the act of December 28, 1922, 42 Stat. 1066; omit

(d) Claims where there is other reason for doubt.

In the present case the report to the effect that the non-return of the loaned wheelbarrows and scaffolding lumber was due to the emergency conditions of permitting equipment to be carried off for use on other projects without any record being kept of where the property was taken may be accepted as establishing a failure to exercise the high degree of care imposed by implied agreement for the protection of property under a bailment for the sole benefit of the bailee. While it appears the wheelbarrows and scaffolding lumber had been used on one other project before their loan in this case, the equipment was comparatively new and, for all practical

purposes of such equipment, was as valuable to the bailor as new equipment and could only be replaced in kind by the purchase of new articles. This, in connection with the circumstances that the equipment appears to have been purchased during a period of lowest prices whereas it would have had to be replaced during a period of rising prices upon the failure of the Government to return the equipment within a reasonable time, would appear to warrant allowance of the amount of the purchase price of the equipment, as claimed and verified. Accordingly, if otherwise correct, allowance in the amount of $160 is authorized.

(Signed) R. N. Elliott

Acting Comptroller General
of the United States.

Inclosures.