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Practical Aspects of Bailment Proof

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PRACTICAL ASPECTS OF BAILMENT PROOF

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In a single breath I propose to say that burden of proof and presumptions, as applied to bailment, are confusing yet overly simplified; confusing in that the courts repeatedly make all manner of conflicting statements as to the applicable rules, overly simplified to the extent that they invoke and rely upon the doctrine that a bailor makes out a *prima facie* case against his bailee by showing the delivery of the goods to the bailee plus a failure to return them or their return in a damaged condition upon demand. It is hoped that some of these propositions may be here at last partially clarified.

Obviously, it will be impossible in an article of this brevity to discuss proof in every type of bailment case, that is, in suits by bailors against bailees, in suits by bailees against bailors, in suits by either bailors or bailees against third persons, and in suits by such third persons against either bailors or bailees. We shall have to content ourselves presently with an analysis of the principles governing burden of proof in the typical bailment case where bailor sues bailee to recover for the loss of, theft of, or damage to the bailed chattel.

In addition, it should be stated that there are no magic formulae or hard and fast rules as to the admission or exclusion of evidence in bailment cases or in the conduct of the trial, this entire area, like many others, being controlled in large part by the sound discretion of the trial judge, operating within the precedent of established type situations and principles of public policy.

I

EVIDENCE CONTROLLED BY PLEADINGS

To start with, it is basic that closely akin to the problems of burden of proof and presumptions in a bailment case are those of pleading, since under the general evidentiary rules relating to relevance, a bailor who does not plead well or well enough in his suit against his bailee is not going to be allowed to offer evidence on the issue. Objection will be sustained or a demurrer to his petition will be allowed. And by the same token, he will not ordinarily be permitted to supply proofs which go beyond the allegations of his pleading.

In this connection, a recent Nebraska case, *Federal Insurance Company v. International Harvester Company*,[1] which may have changed the law of that state, held that where the petition of a bailor in an action

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[1] 164 Neb. 698, 83 N.W. 2d 382, 385 (1957).

to recover for damages caused by fire to the subject of such a bailment while in the custody of the bailee does not allege that negligence of the bailee was the proximate cause of the damage, it does not state a cause of action and is demurrable *ore tenus*. The Supreme Court of Nebraska said:

> Appellant does not in its petition plead a case of non-return of the property, the subject of the bailment, or damage thereto in an unknown manner but appellant goes further and alleges the property was damaged in a definite manner, that is, by a fire, which alone does not give rise to any presumption of negligence of the bailee. [Citing cases.] In such a situation the litigant claiming a right of recovery from a bailee must allege negligence on his part as to the proximate cause of the damage. The petition does not allege that negligence of the appellee was the proximate cause of the fire or of the damage to the tractor. It does not state a cause of action against the appellee and the court properly dismissed the case.

The case decided that plaintiff's failure to allege negligence was fatal. It left unanswered the two questions: (1) whether, had negligence been alleged generally, without any specification of particular negligent acts, dismissal could have been avoided, and (2), had the pleading contained a general charge of negligence, whether plaintiff would have been forced to adduce evidence of negligence before he could rest his case.

As opposed to the foregoing, the case of *Travelers Insurance Company v. Hulme*,[2] a *res ipsa loquitur* case to recover for the fire loss of an automobile, discloses that the petition filed therein contained only general allegations of negligence and the trial court overruled a motion to make this pleading more definite and certain by setting forth in what manner the defendant or his agents and employees failed to exercise proper care in handling the automobile, and by stating the particular acts of negligence relied upon by plaintiff. It follows that in a *res ipsa* case, a general declaration of the defendant-bailee's negligence should suffice.

And in *Threlkeld v. Breaux Ballard*,[3] in which plaintiff's petition stated only that the damage to her bailed automobile was caused by the negligence of the defendant or his employees within the scope of their employment, and plaintiff testified only that she left her car with the defendant for a greasing and oil change, where it was damaged by fire, and another witness for plaintiff proved the extent of the damage, and rested, the Court agreed with plaintiff's contention "that the allegation of negligence contained in the petition was unnecessary and surplusage and it became unnecessary for her to prove such unnecessary allegation. . . ." The Court observed:

The foreign authorities dealing with the question involved are

[2] 168 Kan. 483, 213 P. 2d 645 (1950).
[3] 296 Ky. 344, 177 S.W. 2d 157, 158 (1944).

> conflicting, one line of authorities tending to support the contention of plaintiff and another one tending to support the [opposite] contention of defendant.

As a result, it cannot be said that the law is settled as to whether plaintiff must plead the defendant's negligence and if so whether generally or particularly. Apparently, much depends on the form and theory of the action and the precedent in the jurisdiction.

II

THE INITIAL BURDEN OF PROOF

Seemingly most courts in all jurisdictions agree that a bailment case is the same as any other type of action where the *onus probandi* or burden of persuasion is placed upon the proponent, who is usually the plaintiff, since he has the affirmative of the issue. If, at the conclusion of the trial, the evidence is so in equipoise that the jury cannot say on which side the truth lies, a situation which rarely obtains in practice, the plaintiff or bailor will be the loser.[4]

In *Hildebrand v. Carroll*,[5] which involved the bailment of a horse, the Supreme Court of Wisconsin said:

> The request and the instruction given fairly raised the question frequently referred to in the books as to the "burden of proof" in cases of this kind. The general rule in actions for negligence is that the burden of proof is upon the party asserting it. . . . In speaking of the relative duties and obligations of bailors and bailees, some confusion has arisen in the books as to the burden of proof to establish negligence. Technically speaking, that burden always rests upon the plaintiff. But there are certain classes of bailments, when the property is in the exclusive possession of the bailee, and the property is returned damaged, in which it is said the law casts upon the bailee the burden of showing that the loss did not occur through his negligence. The authorities are by no means harmonious on this question. The ancient rule and older decisions are to the effect that the loss or injury raises no presumption of negligence. The more modern decisions hold that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. 3 Am. & Eng. Ency. of Law (2d Ed.) 750, and cases. It is not our purpose to review or attempt to reconcile these decisions. This court, never having passed upon the rule properly applicable to the facts in this case, feels at liberty to adopt one that will fully meet its requirements, and still preserve harmony in the law of negligence. We therefore hold that when the bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, and the property is returned in a damaged condition, and it is shown that the injury is such as does not ordinarily occur without negligence, proof of these facts establishes a *prima facie* case . . . [that] the law will then presume

[4] Clemenson v. Whitney, 238 Ill. App. 308 (1925), and cases cited.
[5] 106 Wis. 324, 327-28, 82 N.W. 145, 146 (1900).

the evidence? In other words, when the bailor has shown delivery and a failure to return on demand, has he placed his case in the second or in the third stage of judicial hospitality as explained by the great Wigmore?

Modern cases seem unanimously to hold that once the bailor has made out his *prima facie* case, he has not caused the true burden of proof of risk of non-persuasion to shift to his adversary, but only the burden of proceeding, but they almost uniformly fail to make clear what is the consequence of the failure of the bailee to offer evidence of his diligence. Is the penalty intended to be a summary ruling for the bailor whereby the bailee is thrown out of court *qua* that issue or is it simply a matter of the judge charging the jury that they may infer that the bailee is negligent if they so desire,—in other words that such a *prima facie* case warrants decision but does not require it? The courts apparently do not act uniformly in this area, and one would suspect that no little misunderstanding is occasioned by reference to the "presumption" of negligence so created. If, indeed, it is a true presumption in the sense of a mandatory but rebuttable inference, it would of course be sufficient not only to carry the case to the jury, but, if unopposed, to remove all question of fact and require a directed verdict. On this, Professor McCormick writes:

> When a bailor proves delivery of the property to the bailee in good condition and return in a damaged state, or a failure to return after due demand, a presumption arises that the damage or loss was due to the negligence or fault of the bailee. This presumption is mandatory.[10]

In the case of *Bowman v. Vandiver*,[11] which was a suit to recover for damages to rented road equipment, the Court said:

> In the present case the court peremptorily instructed the jury to find for plaintiff the reasonable cost of repairing the scarifier. This instruction was proper in the absence of evidence on the part of Bowman & Martin showing that it was damaged without their negligence.

Again, in *Hogan v. O'Brien*,[12] an action against a garage keeper for loss of plaintiff's automobile through theft, the Court said by way of dictum,

> . . . in default [of such proof], the bailor is entitled, as a matter of law, to a verdict in his favor.

And in *Trammell v. Whitlock*,[13] it was held that where the bailee of a trailer gives an explanation of the damage to the trailer inadequate to

[10] McCormick, Evidence §309 (1954).
[11] 243 Ky. 139, 47 S.W. 2d 947, 948 (1932).
[12] 212 App. Div. 193, 208 N.Y.S. 477, syl. 3 (1925).
[13] 150 Tex. 500, 242 S.W. 2d 157, syl. 6 (1951).

exculpate him of negligence, the bailor is entitled to an instructed verdict on that issue.

Truly, the foregoing is little more than academic, since the presumption of the bailee's negligence which arises from the bailor having made out a *prima facie* case rarely stands unopposed, and whenever evidence is adduced by the bailee tending to exonerate him from liability, it would seem that the matter of his fault should properly be left to the jury.[14] It could even be urged that all directed or instructed verdicts should be avoided and the question of the bailee's negligence uniformly be left to the jury, even when it stands uncontradicted, inasmuch as the plaintiff's *prima facie* case will almost invariably depend on the testimony of witnesses and it is no mere rigamarole to state that all questions of their credibility are for the jury.

IV

Applicability of the "Res Ipsa Loquitur" Doctrine.

The question of what action the court should take when the bailor's *prima facie* case stands unopposed is further complicated by the insistence of many courts on deciding the case on the theory of *res ipsa loquitur*. It is to be noted that the doctrine of *res ipsa loquitur* is not really applicable to a large number of bailment cases. The rule states, quite simply, that when there is an instrumentality (such as a machine) in the exclusive control of the defendant, which when properly used does not result in damage, yet damage is shown to have occurred without fault of the plaintiff, the law "presumes" that the defendant was negligent. It would appear that a very considerable number of bailment cases do not really involve such an exclusively controlled instrumentality at all, for example it seems illogical to equate an automobile parking lot to a machine and certainly the car itself, which was the subject of the damage there, should not be considered in that category. But we should not forget that the classic example of *res ipsa loquitur* was the case of a barrel of flour rolling out the window of a warehouse and inflicting injury on a passerby.

In any event, it was held by Mr. Justice Pitney in *Sweeney v. Erving*,[15] a case involving injury to a patient from an x-ray machine, that ordinarily ". . . *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference. . . ." To the same effect see *Levine v. Union & New Haven Trust Co.*,[16] *March v. Henriksen*,[17] and Prosser, *The Procedural Effect of Res Ipsa Loquitur*.[18]

[14] Capitol Dairy Co. v. All States Auto Body Builders, Inc., *supra* note 7; Lederer v. Railway Terminal & Warehouse Co., 346 Ill. 140, 178 N.E. 394 (1931).
[15] 228 U.S. 233, 240 (1913).
[16] 127 Conn. 435, 17 A. 2d 500, syl. 2 (1941).
[17] 213 Minn. 500, 7 N.W. 2d 387, syl. 2 (1943).
[18] 20 Minn. L. Rev. 241 (1936).

Professor McCormick observes[19] that, "Even under this view as to the normal procedural effect of the doctrine, it is recognized that the circumstances in the particular case may make the inference irresistible, and entitle the plaintiff to a directed verdict when his evidence is not refuted by counter-proof. [Citing *Alabama V. .Ry Co. v. Groome*[20] and Prosser on Torts.[21]]." But even if the doctrine of *res ipsa loquitur* gives rise to no more than an inference sufficient to carry to the jury the matter of the bailee's negligence *vel non,* it is suggested that in a bailment case its procedural effect should be different from, say, a personal injury suit. "Prosser argues that the mandatory effect should be accorded only in cases such as those of carriers and bailees where policy justifies imposing special responsibility."[22]

So it would seem that it makes little difference whether or not a bailment is analyzed on the basis of *res ipsa loquitur,* except as the analysis affects the symmetry of the law, since in either case the bailor's unopposed *prima facie* case would probably require summary disposition by a directed verdict in his favor. It is to be noted, nevertheless, that there is ample precedent in the books for classifying the "presumption" of *res ipsa loquitur,* even as applied to a bailment case, as only a permissive inference, as in the case of *Echinger v. United Mutual Fire Insurance Company,*[23] where the opinion reads:[24]

> But while we believe that the evidence presented a prima facie case upon which the court could have found negligence on the part of the bailee, we also believe that such evidence did not compel such a finding.

V

What Makes Out a Prima Facie Case?

So if we now know what happens to a bailor who fails to make out a *prima facie* case against his bailee, namely that a verdict is directed against him, and what befalls a defendant who fails to oppose such a showing, namely the probability of a directed verdict against him, we should next ask what it takes (1) to make out a bailor's *prima facie* case, and (2) what it is necessary for the bailee to show to avoid a directed verdict against him and to insure the case getting to the jury.

The question of what makes out a *prima facie* case by a bailor, as heretofore stated, has been unduly over-simplified, at least from the standpoint of a practitioner who must actually do so in court. He is led to believe that if he shows the bailment, a failure to redeliver or the damaged condition, and the demand where one is necessary, he can

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[19] McCormick, Evidence §309, n. 23 (1954).
[20] 97 Miss. 201, 52 So. 703, 704, syl. 6 (1910).
[21] McCormick, Evidence §309, n. 23 (1954).
[22] *Ibid.*
[23] D.C. Mun. App., 61 A. 2d 725 (1948).
[24] *Id.* at 726.

then sit back and enjoy his laurels, as his victory will be instantly proclaimed. This may be true, but first he must adduce evidence of each of these elements. And even then, he must offer evidence of the extent of his damage, if he expects to recover anything.[25] No so-called presumption will operate to excuse him on this score. In the *Tannhaeuser* case last above cited, the Supreme Court of Wisconsin stated:[26]

> The defendant takes the position that, in the absence of substantial performance by the plaintiff, the plaintiff's breach bars it from recovering anything from the defendant. However, 5 Williston, Contracts (rev. ed.), p. 4118, sec. 1473, states there is an increasing tendency by courts in recent years not to apply such harsh rule, but to permit a plaintiff, who has substantially breached a contract, to recover in those situations where the defendant would be unjustly enriched if recovery were denied. This court has adopted this more lenient rule. . . . [Citing cases.] However, in order for the plaintiff to recover anything on such theory in the instant case *the burden was upon it to prove how much the unlighted sign had benefitted the defendant.* . . . This burden was entirely unmet by the plaintiff as it assumed that it was entitled to the full contract rental unless the defendant proved some damage under its counterclaim. This assumption on plaintiff's part was entirely erroneous absent the finding that it had substantially performed its contract. [Emphasis supplied.]

It would accordingly appear that a court will not guess what damage the bailor has sustained through the bailee's negligence.

But to revert to a consideration of the elements of the bailor's *prima facie* case, viz. the delivery, the failure to redeliver and the demand, how are these to be shown and by whom? It is respectfully submitted that it is not enough for a bailor to show that some vaguely described chattels belonging to him found their way into the hands of the bailee. He must, in the first instance, make a showing of what particular, specific chattels these were. Of course, if the entire controversy is over the theft of a single automobile from the bailee's premises, there is no special problem. The bailor simply testifies that he delivered the car to the bailee's lot or garage for storage or repair and that when he asked for it, it was missing or damaged. However, when the subject matter of the bailment is many things, as in the case of an inventory of a business or a stock of goods on hand under a continuing arrangement between a manufacturer and an artisan employed to process same, the artisan receiving goods from the bailor daily and currently returning those completed, the problem of the bailor establishing what goods were in possession of the bailee at any given time becomes more complicated, involving access to inventories, summaries

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[25] Wm. G. Tannhaeuser Co. v. Holiday House, Inc., 1 Wis. 2d 370, 83 N.W. 2d 880 (1957).

[26] 1 Wis. 2d 370, 376-77, 83 N.W. 2d 880, 884 (1957).

and other evidence. And it is the duty of the bailor to show what was in the hands of the bailee at the time of the casualty in question.

Even in the simpler situations where a single chattel is bailed, it is often necessary to show precisely its characteristics, as its size, weight, color or otherwise, without which it will be difficult or impossible to determine whether or not the bailee has been negligent or has fulfilled the terms of the contract of bailment. In this regard, the Supreme Court of Wisconsin, in the case of *Parish v. Gilmore*,[27] said:

> [T]he difficulty with the case is, that the testimony does not show that the defendant did not cut the garment as long as the cloth would admit of. It is assumed on the part of the plaintiff that there were two yards of cloth in the piece, and that from that quantity of cloth the cloak might have been cut longer than it was. But there is no positive evidence in the record that there were two yards in the piece. . . . As the plaintiff did not prove the fact that there were two yards of cloth in the piece, he failed in the most material part of his case. . . .

It is further stated that the bailor must adduce evidence of the failure on the part of the bailee to redeliver the chattel to him, in order to make out a *prima facie* case. This should not be impossible to do in a case such as his depositing a suitcase in a checkroom, where his own testimony that he asked for it and the bailee failed to produce the bag, would suffice. However, in the complicated situation above suggested, where the bailor receives daily redeliveries of many items from the bailee, it may be doubted that his categorical and conclusory assertion on the stand that the bailee has failed to return numerous specific items to him would be enough to take the issue to the jury. To require more than his bare assertion on his part would, naturally, be placing on him the burden of proving a negative, a difficult burden at best, but by no means unknown in the law. He could, by appropriate discovery procedures, ascertain what receipts of his the bailee holds for such redeliveries, offer these in evidence as a part of his own case and thereafter wait for the defendant to show the return of other material. This should be no different or more difficult than proving any other negative, such as the plaintiff's freedom from contributory negligence, that an insured did not commit suicide or that there is no such person as the signatory to a check. And while evidence of how damage befell the bailed chattel may be peculiarly within the knowledge and control of the bailee, so as to justify a court in requiring the bailee to go forward with the evidence on this point, the same cannot be said as to whether or not the subject matter of the bailment was returned to the bailor. This would seem to be shared information.

As to the requirement that a demand for his chattel be shown

[27] 33 Wis. 608, 610-11 (1873).

by the bailor, we forsee no difficulty on this score for two reasons: first, a demand is not always required, and where the substantive law does not insist upon one the court would not, and secondly, there are many decisions that demand is made by the filing of suit, which ought to fulfill the requirement in this case.

VI

What Constitutes a Prima Facie Defense?

Now it is incumbent to consider what the bailee must do, once the bailor has made out a *prima facie* case, in order to make out a *prima facie* defense and avert a peremptory ruling by the court against him. Some years ago, it was more common than it is today to find courts taking the position that once a bailor has made out a case sufficient to go to the jury, the burden of proceeding, or the evidentiary burden, shifts to the bailee who, if he shows the nature of the casualty or what happened, is excused from the danger of a peremptory ruling against him and is not required to show affirmatively that the loss was not occasioned by his negligence. He was not required either to produce evidence of his due care or to convince the jury that he was diligent. He had made out a *prima facie* defense, causing the burden of proceeding to shift back to the plaintiff-bailor, who then had the duty of adducing evidence as to the respect in which the bailee was negligent and ultimately of inducing belief in the minds of the jury that the defendant was at fault. That style of thinking is generally not in fashion today, most courts making the bailee go forward sufficiently to show not only the cause of the loss or damage but that it occurred without his fault, since the mere nature of the occurrence would not necessarily exonerate him from negligence, and this would seem to be the better rule.

The early case of *Sanborn v. Kimball*,[28] which was a suit over the death of a horse in the hands of a bailee, is representative of the thinking at that time. In it the Court said:[29]

> It is settled in this state, whatever the doctrine may be elsewhere, that in an action of negligence against a bailee, not a common carrier, the general burden of proving negligence rests upon the plaintiff. If he proves the bailment and a failure to return on demand, he has ordinarily made a prima facie case, and it is then incumbent on the bailee to explain the cause of the refusal, as by showing the loss of the property by fire or theft, or its injury by accident or otherwise. It then devolves upon the plaintiff to show that such fire or theft or accident was due to the failure of the bailee to use such a degree of care of the property as under the circumstances the law requires. The final

[28] 106 Me. 355, 76 Atl. 890 (1910).
[29] *Id.* at 890-91.

> burden is on the bailor to prove negligence, not on the bailee to prove due care. [Citing cases.]

Illinois appellate courts have held both ways on this problem in the past. Some took the position that the bailee was exonerated when he showed the cause of the loss, leaving the burden of showing the bailee's negligence to the bailor.[30] Others insisted that the bailee go forward sufficiently not only to disclose the casualty or other fact but to negative the possibility of his own negligence.[31] In the case of *Rhodes v. Warsawsky,*[32] the Court said in the opinion:[33]

> But it is also the rule that where the failure to deliver is explained by the fact appearing that the goods bailed have been stolen or destroyed by fire, and the bailee is no longer able to deliver them, the law will not presume negligence and the onus or burden of proving the same is upon the bailor.

It is to be noted at this juncture that the case of *Cummins v. Wood,* cited in *Rhodes,* does not support the alleged rule, as will hereinafter appear. Opposed to the above quotation from the *Rhodes* case, above cited, the case of *Scherb v. Randolph Wells Auto Park, Inc.* recites:[34]

> . . . In *Clemenson v. Whitney,* 238 Ill. App. 308 [opinion by Mr. Justice Thomson] the court reviewed the Illinois authorities from *Cummins v. Wood,* 44 Ill. 416, 92 Am. Dec. 189. The opinion states: 'Of course the burden of proof is on the plaintiff to prove his or her case, and it remains there throughout the trial and never shifts to the defendant. That is true on the issue of negligence in a bailment case. But when the plaintiff has made out a prima facie case, as is done in a bailment case merely by showing the delivery of the bailed goods to the bailee and failure of the latter to return them on demand or delivery in a damaged condition, then the burden of proceeding with the evidence falls on the defendant and remains there until the plaintiff's prima facie case is overcome. The real question is, *what must the defendant show,* in order to overcome the prima facie case of negligence made out by the plaintiff? Is it sufficient to show the bare fact that the bailed articles have been burned up or stolen while in the bailee's possession? Obviously not. They may have been lost in either of those ways by reason of the gross negligence of the bailee himself or his servants. If the bailed articles have been burned up or stolen while in the bailee's possession, the prima facie case made out by the plaintiff's proof that the bailee has failed to return the articles upon demand is not met or overcome unless the bailee shows that the fire or robbery was not due to his carelessness or that he has

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[30] Rhodes v. Warsawsky, 242 Ill. App. 101 (1926).
[31] Scherb v. Randolph Wells Auto Park, Inc., 301 Ill. App. 298, 22 N.E. 2d 796 (1939).
[32] Rhodes v. Warsawsky, *supra* note 30.
[33] Rhodes v. Warshawsky, *supra* note 30, at 105-106.
[34] Scherb v. Randolph Wells Auto Park, Inc., *supra* note 31, at 300-301, 22 N.E. 2d at 797-98.

> exercised the degree of care called for by the nature of the bailment. The reasons for that rule are clearly set forth by our Supreme Court in the *Cummins* case and we have already quoted them. [Emphasis supplied.]

This difference in the views of the several appellate courts in Illinois on the subject of how far the bailee must go forward, was finally settled, after the Supreme Court granted a certificate of importance in the case of *Byalos v. Matheson.*[35] In the last cited case, the Illinois Supreme Court rejected the view that if the bailee shows that the goods were lost, stolen or destroyed by fire, the burden of showing negligence on the part of the bailee is on the bailor and held that before the bailee is relieved from liability, he must show that the loss, theft or destruction by fire was not the result of any negligence on his part.[36]

As the Illinois courts have now resolved their differences as to how far a bailee must go forward with the evidence in these situations, by compelling him to prove his freedom from negligence as well as just showing fire, theft, or mysterious disappearance, it seems a little strange, at this late date, to find courts in scattered jurisdictions still insisting that it is enough if the bailee show the casualty alone. It seems patent that a bailor is no better able to demonstrate the respect in which the bailee was negligent after he learns that the goods were destroyed by fire than he was before that knowledge reached him. Consequently, cases like *Fox Chevrolet Sales, Inc. v. Middleton,*[37] we submit, with deference to the learned court and counsel, seem unduly technical and ill advised. There an automobile belonging to the plaintiff was stolen from a repair shop. The Court said, in relevant part:

> The parties are in accord as to the law which controls the case. . . . when the loss or injury is accounted for as having been occasioned by a cause which would excuse the bailee, such as a burglary of his premises, then the defense is complete, unless the bailor follows by showing that the bailee, by the exercise of ordinary care and diligence might have avoided the loss or injury. The burden of proving negligence never shifts from the plaintiff. He must prove the delivery, the bailment and the failure to return; thereupon it is incumbent upon the bailee to explain that failure. If he does so, the bailor must prove that the bailee failed to use ordinary care and diligence to safeguard such property and that his failure to perform that duty caused the loss. [Citing cases.][38]

It is difficult to appreciate that a defense against negligence is complete by showing theft, for even if the bailee is not an insurer,

[35] 243 Ill. App. 60, *aff'd,* 328 Ill. 269, 159 N.E. 242 (1927).
[36] Oscar Heyman & Bros. Inc. v. Marshall Field & Co., 301 Ill. App. 340, 346, 22 N.E. 2d 776, 778-79 (1939). See also, Till v. Material Service Corp., 288 Ill. App. 103, 5 N.E. 2d 769 (1937) and Lindor v. Burns, *supra* note 7.
[37] 203 Md. 158, 99 A. 2d 731 (1953).
[38] *Id.* at 732-33.

the theft could be due to his negligence. However, under the specific evidence introduced by the defendant in this case, which included a showing that there was no watchman on duty the night of the theft, it is possible that the plaintiff could have assigned such failure as negligence. We do not think that courts which today support the rule that the bailee has proceeded far enough by showing the theft, fire, or loss, mean to say that a bare statement of such cause will suffice.

Moreover, it is noteworthy that all controversy with respect to the foregoing is now tempered in the light of the rule, or perhaps it should be called the exception, established by the *Collard* case, a cause celebre. In *Royal Ins. Co. v. Collard Motors*,[39] being a suit to recover for the destruction by fire of the bailor's automobile in bailee's repair shop, the Court reviewed the decisions holding that a bailee is not an insurer and may avoid liability by showing that the goods were burned whereupon "the burden again shifts to the shoulders of the bailor to show that the fire was caused by the bailee's negligence." The Court announced:

> But running through those decisions, there is in each a clear intimation that the cause of the fire and its general nature gave prima facie evidence of absence of fault on the part of the bailee, and in none of them do we find facts such as we notice here where there was no general conflagration. Here the fire originated entirely within the bailee's premises; it was limited in its scope — confined entirely not only to the interior of the premses solely within the control of the bailee, but, in fact, to the sole and single object which formed the subject of the bailment. It would indeed do violence to the reasons on which is established the general rule contended for by the defendant to extend the rule to such facts. To do so would give to any bailee an "open sesame" whenever, through his carelessness, property entrusted to him might be burned. He could merely point to the fire and say, "I know nothing about it," and rest secure, requiring the bailor, with the hardihood to persist in his claim, to prove that there had been negligence on the part of the bailee, which, having no knowledge whatever of the real facts, of course he could not do. . . .[40]

Accordingly, the Court held that the bailee was required to prove his freedom from fault in such case. The decision is followed today and appears to be closely related to the doctrine of *res ipsa loquitur*.

More impressive are the decisions which place upon the bailee the true burden of affirmatively demonstrating to the jury that the defendant was free from fault. The facts of *Hoel v. Flour City Fuel & Transfer Co.*[41] were similar to those in the *Fox Chevrolet* case, above, but the Court held:

[39] Ct. of App. La., 179 So. 108 (1938).
[40] *Id.* at 110.
[41] 144 Minn. 280, 175 N.W. 300 (1919).

> In Rustad v. Great N. Ry Co. 122 Minn. 453, 142 N.W. 727, we had the question of the liability of the railway company defendant as a warehouseman for the loss of property in its possession. We held that the burden of proof was upon the defendant to show that the loss did not come from its negligence; that this burden was not merely the burden of going forward with proofs, nor a shifting burden, but a burden of establishing before the jury that its negligence did not cause the loss; and we referred with approval to Dean Wigmore's statement that the question of where the burden of proof should rest is "a question of policy and fairness based on experience in the different situations." . . . and we expressed the view that the rule adopted was the practical working rule. . . .[42]

Judge Dibell, who wrote the opinion, explained:

> . . . The plaintiff knew nothing and could know nothing of the circumstances of [the car's] disappearance. The defendant was paid for furnishing storage which carried with it the duty of giving some measure of care. It had men in charge of the garage giving attention to its patrons and their property. It was or should have been in possession of such circumstances as could be disclosed relative to the loss.[43]

Again, in Illinois there are some cases which indicate that the courts intend to allocate the true burden of persuasion on the issue of the bailee's negligence to the bailee himself, but these pertain mostly to the innkeeper relationship.[44]

In sum, there is little doubt that the prevailing rule places upon the bailee the duty of going forward with the evidence far enough to exonerate himself from negligence, which he cannot do simply by showing that there was a fire or theft or mysterious disappearance, and in some instances the bailee is made to satisfy the jury upon that point, and such is the better rule.

VII

Other Problems of Bailment Proof

There remain a few additional considerations which must be mentioned if one is to view practically the problems of bailment proof. First among these is the question of whether or not the contributory negligence of the bailor is a defense in his action against the bailee. Generally, it can be said that in business type bailments for the mutual benefit of bailor and bailee, the contributory negligence of the bailor is no defense to the negligence of the bailee.[45] However, Professor

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[42] *Ibid.*

[43] Hoel v. Flour City Fuel & Transfer Co., 144 Minn. 280, 175 N.W. 300 (1919). See also, Peet v. Roth Hotel Company, 191 Minn. 151, 253 N.W. 546 (1934).

[44] Burton v. Drake Hotel Co., 237 Ill. App. 76, 84 (1925); Rockhill v. Congress Hotel Co., 237 Ill. 98, 102, 86 N.E. 740, 741 (1908).

[45] Brown, Personal Property §85 (2d ed. 1955).

Brown[46] notes in his well-known work on personal property that "if the bailor knows as well as the bailee the risk that is to be run, the latter may be relieved of liability on the ground that the bailor either assumed the risk, was contributorily negligent, or else had entered into an implied agreement exempting the bailee from losses due to those risks of which the bailor was cognizant."[47] And in mutual benefit bailments involving a guest's baggage lost or damaged in the hands of an innkeeper, it is frequently held that the burden cast on the innkeeper to exonerate himself may be met by showing that the loss was caused by the personal negligence of the guest or someone for whom the guest was responsible.[48] In those instances where the bailor's contributory negligence affords the bailee a defense, the question of who must show that contributory negligence is believed to be largely governed by the local rules of the jurisdiction, but by and large this is something for the defendant to show after plaintiff has made out his prima facie case.

The Wisconsin comparative negligence rule, when applied to other fields such as personal injury, permits a plaintiff who is also to blame for a personal injury sustained by him due to the negligence of the defendant to recover nevertheless, which is not allowed under the law of other states. But there would not appear to be any reason to suppose that this rule was intended to displace the general law of bailment which makes the acceptance of the bailment by the bailee who is thereafter negligent a "deceit" upon the bailor.

As to the weight and sufficiency of the evidence adduced, it is said[49] that general rules control, and that in actions between a bailor and his bailee, as in civil actions generally, plaintiff should prove by a preponderance of the evidence the essential elements of his cause of action[50] and it is for the jury, or the court in a bench trial, to say whether or not the evidence is sufficient to induce a truth saying.[51]

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[46] Ray Andrews Brown, Professor of Law, University of Wisconsin Law School.
[47] BROWN, PERSONAL PROPERTY §85 (2d ed. 1955).
[48] Rockhill v. Congress Hotel Co., *supra* note 44.
[49] 8 C.J.S. *Bailments* §52 (1938).
[50] Roberts v. Minier, 240 Ill. App. 518 (1926).
[51] 8 C.J.S. *Bailments* §52 (1938); Venne v. Damrow Bros. Co., 192 Wis. 249, 212 N.W. 796, 798 (1927).