petuities do not apply and accumulations are governed by the law as it has existed since the Thellusson Act.[43] The conclusion of the Ontario Commission with a draft amending Act has been recommended to other provincial Law Reform Commissions with a view to uniform law throughout Canada.

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PERSONAL PROPERTY

In *Spurgeon* v. *Aasen*[1] the defendant claimed a gift to her of the contents of the house in which she had been living "common law" with the plaintiff. The claim was rejected, for lack of evidence of any delivery to complete the verbal gift. "In the absence of writing[2] delivery is essential to complete a gift of chattels."[3]

This decision seems to bring the law of Western Canada into line with the position in Ontario[4] and England,[5] which have adopted the regrettable view that if a husband says to his wife,[6] "All the furniture in the house is yours", there is no gift, but if he accompanies this declaration by the "mere formality"[7] of picking up a chair and handing it to her, the gift is completed by "symbolic" delivery.[8]

The bald statement of the rule in *Spurgeon* v. *Aasen*, quoted above, is even more unfortunate, in that the attention of the Court does not appear to have been drawn to two western Canadian decisions which show a more sensible approach to the problem of gifts of "non-manuable"[9] objects between members of a common household. In *Tellier* v. *Dujardin*[10] the Manitoba Court of Appeal upheld a verbal gift of a piano by a father to his daughter, on the basis that, as donor and donee had common *de facto* possession, the words of gift vested the legal possession in the donee and completed the gift.[11] In *Standard Trust Co.* v. *Hill*[12] the Appellate Division of the Supreme Court of Alberta, Clarke, J. A., dissenting, upheld the gift of his automobile by

43. Thellusson Act. 39-40 Geo. III, c. 98.

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1. (1965) 52 D.L.R. 2nd 67 (B.C., Verchere, J.).
2. *i.e.*, a deed. A simple writing is not enough, without delivery.
3. (1965) 52 D.L.R. 2nd 67, at p. 73, quoting 18 Hals., 3rd ed. p. 382.
4. *Kingsmill* v. *Kingsmill* (1917) 41 O.L.R. 238.
5. *Re Cole* (1964] Ch. 175 (C.A.).
6. The same rule applies to all cases where donor and donee are members of a common household, e.g., father and daughter.
7. *Per* Wills J., in *Kilpin* v. *Ratley* [1892] 1 Q.B. 582, at p. 586.
8. *Lock* v. *Heath* (1892) 8 T.L.R. 295. If the donee is already in possession (or, it seems, if possession is subsequently acquired otherwise than from the donor) the gift is good without even symbolic delivery: Re *Stoneham* (1919) 1 Ch. 149. *Kilpin* v. *Ratley, above*, appears to be the only English case where a gift was upheld without either symbolic delivery or prior possession of the donee. There, possession was in a third party.
9. *i.e.*, which are not capable of physical handing over.
10. (1906) 16 Man. R. 423.
11. A contrary conclusion was reached in similar circumstances in *Hislop* v. *Hislop* [1950] W.N. 124 (C.A.) and *Williams* v. *Williams* [1956] N.Z.L.R. 970.
12. (1922) 68 D.L.R. 722.

the husband as a wedding present to his wife, although there was no evidence of any act of symbolic delivery.[13]

Bearing in mind that the court must view an allegation of verbal gift with considerable caution, it is submitted that justice is sufficiently done by requiring unequivocal proof that the donor clearly expressed his present intention to make the gift,[14] and that the unyielding requirement of symbolic delivery to complete the gift is a wholly unnecessary piece of meaningless formalism.

Gray v. *Canwest Parking Ltd.*[15] adds to the now long line of authority in Ontario[16] to the effect that if the owner of a car wishing to park at a commercial parking lot leaves the keys in the vehicle at the request of the lot attendant, the parking lot operator is constituted a bailee of the car. As bailee the operator is liable for loss of, or damage to, the car during the period of custody, unless he can show either that the loss happened without negligence on his part, or that the loss is covered by a clause in the contract of bailment exempting the operator from liability for the loss.

Whether, as a matter of policy, it is desirable to impose the liability of a bailee on the parking lot operator is debatable. There is much to be said for the view, which is cogently expressed in the argument of counsel for the defendant in *Hollins* v. *Davy*,[17] that the real question in this situation is one of insurance. It is more likely than not that the car owner is already carrying insurance against theft and damage; if the parking lot operator is forced to carry insurance as well, the result is an unnecessary and wasteful duplication of insurance cover, as well as an increase in the cost of parking space.

On the other hand, the problem can be side-stepped by the bailee's exempting himself in the contract from liability for loss of or damage to the customer's car. The main interest of *Gray* v. *Canwest Parking Ltd.* lies in the fact that the bailee's attempt to exclude his liability was unsuccessful. As far as the exemption printed on the parking ticket is concerned, the result was inevitable: the plaintiff did not receive a ticket on this occasion, and he had no previous knowledge that such a term was invariably incorporated into the defendant's parking contract.

More surprising is the decision that two notices on the lot, stating "Vehicle and Contents Left at Owner's Risk", were not in sufficiently unambiguous terms to exclude the bailee's liability for the negligence of his employees.[18] It is true that an almost identical notice was found

13. Except, possibly, the fact that on one occasion the husband said to the wife, "Now you can go for a ride in your car." The wife paid the licence fee and some repair bills.
14. Words such as "it's all yours" do not necessarily mean that the donor intends to part with ownership. See *Kingsmill* v. *Kingsmill, above.*
15. (1965) 52 W.W.R. 56 (B.C., Co. Ct.).
16. See, e.g., *Brown* v. *Toronto Auto Parks* [1955] 2 D.L.R. 525 (Ont. C.A.); *Samuel Smith* v. *Silverman* (1961) 29 D.L.R. 2d 98 (Ont. C.A.), where the contrary was not even argued.
17. [1963] 1 Q.B. 844 (C.A.) at p. 846-7.
18. The court found it unnecessary to decide whether the notices had been sufficiently drawn to the customer's attention.

insufficient in *Brown* v. *Toronto Auto Parks Ltd.*,[19] but a moment's reflection will show the weakness of this view. "Owner's Risk" is a pointless expression unless it refers to matters for which the bailee would, apart from the clause, be responsible; the bailee's only responsibility in this situation arises out of his negligence, therefore "Owner's Risk" must refer to, and exclude, the bailee's liability for negligence.[20]

It is usually assumed that in Canada, as in England, proof by the bailor that the goods have not been returned, or have been returned in a damaged condition, raises a *prima facie* case of negligence against the bailee, and puts the onus on the bailee to show, if he can, that the loss or damage occurred without his negligence. Statements that the onus is on the bailor can be found in the older cases, but the modern authorities are conclusively against this view.[21] It is further assumed that the bailee bears the onus of disproving negligence whatever the type of bailment.[22]

Wong Aviation Ltd. v. *National Trust Co.*[23] offers a challenge to these assumptions. The defendant represented the estate of one T. who had hired a plane from the plaintiff one afternoon. The weather conditions were marginal, and T. was shown to be neither an experienced nor a particularly skillful pilot. The plane (and T) disappeared without trace, and the plaintiff sued for the value of the machine, relying on the rule that the onus of disproving negligence lay on the defendant.

The action failed. It is perhaps difficult to be sure of the *ratio* of the judgment, but the dominant ideas in the learned judge's mind appears to have been the following. First, the ordinary rule as to the onus of proof in bailment is satisfactory where the loss is of a type that normally only happens if the bailee has been negligent, but aviation accidents are not necessarily, or even usually, the result of negligence on the part of anyone.[24] Secondly, the plaintiff had allowed T to take the machine up with full knowledge of the adverse weather conditions, and of T's limited capabilities as a pilot. The court relied on a passage in Story[25] where it is stated that the bailee may be, to the knowledge of the bailor, so "notoriously careless" that the bailor must be taken to be content to "run the risk" of putting his goods in the hands of such a person.

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19. [1955] 2 D.L.R. 525 (Ont. C.A.).
20. Cf. *Rutter* v. *Palmer* [1922] 2 KB 87 (C.A.).
21. *Morris* v. *C. W. Martin & Sons Ltd.* [1965] 3 WLR 276, at p. 282. (Lord Denning, M. R.). *The Queen* v. *Halifax Shipyards* (1956) 4 D.L.R. 2nd. 566, at p. 571 (Thorson, P.).
22. 2 Hals. 3rd ed., p. 97 note (d); Paton, Bailment in the Common Law, 165.
23. (1965) 51 D.L.R. 2nd 97 (Ont.).
24. It was on this ground that *McCreary* v. *Therrien Construction Co.* [1952], 1 D.L.R. 153, (Ont. C.A.)—one of the leading Canadian cases on the onus rule—was distinguished. Paton, pp. 167-168, is cited in support of this view, without, however, any notice being taken of the fact that Paton is purporting to summarize the American authorities, and not stating his own opinion, which this view clearly does not represent.
25. Bailments, 9th ed. s. 66. It is to be noted that Story is an adherent of the "old school", which puts the onus of proof, in general, on the bailor. (op. cit., at pp. 364, 365).

This latter reason, if true,[26] would have been sufficient to dispose of the case. The former suggestion has a lot to commend it, though it is unsupported by authority.[27] There is, however, a further possibility, which does not seem to have been canvassed in the case: is it right to assume that the same onus rule applies in all types of bailments? With rare exceptions the rule has always been considered in bailments for *custody*,[28] and little, if any, attention has been paid to the fact that hire has hardly anything in common with custody except the name bailment. In the case of custody the bailee is providing a service for which the bailor is paying, but in hire it is the bailee who is paying for the use of goods provided by the bailor. Is it not rather absurd if the hirer is paying for the privilege of having to bear the risk of loss of the bailor's goods, unless he can show that he was not negligent?[29]

Two cases in the Court of Appeal in England raise the problem of the bailee's liability where the goods are stolen by the bailee's own employee. The decisions establish, firstly, that the bailee is liable, in principle, if the goods are stolen by an employee to whom the duty of safe-keeping under the bailment has been delegated, but not otherwise; and, secondly, that this liability may be excluded by an appropriately worded exemption clause.

In *Morris* v. *C. W. Martin & Sons Ltd.*[30] the plaintiff delivered a mink stole to B, a furrier, to be cleaned. B did not do cleaning himself, and, with the plaintiff's consent, he sub-contracted the job to the defendant. The defendant gave the fur to its employee M, to clean, and M stole it. The defendant was held liable.

Lord Denning, M. R., put the matter thus: there is, generally speaking, no duty to protect the goods of others against theft,[31] but the bailee for reward[32] does come under a duty to guard the goods of the bailor against theft, and he is liable for the default of any employee to whom he has entrusted the performance of this duty, whether the default lies in the fact that the employee negligently enabled a third party to steal the goods, or stole them himself. The mere fact that the thief is an employee of the bailee is not enough; at the most, that gives the thief his *opportunity* to steal the goods.[33] It must be the default

26. The court declined, however, to say that T was "notoriously careless": 51 D.L.R. 2d. 97, at p. 105.

27. Unsupported by Canadian or English authority, that is. See note 24, above.

28. *McCreary* v. *Therrien Construction Co.*, above note 24, was a case of hire.

29. It may also be doubted whether the practice with regard to the insurance of goods let out on hire supports the view that the owner is looking to the hirer to bear the primary responsibility if the goods are lost.

30. [1965] 3 W.L.R. 276.

31. *Deyong* v. *Shenburn* [1946] K.B. 227 (C.A.) *Edwards* v. *West Herts, etc.* [1957] 1 W.L.R. 415 (C.A.).

32. Lord Denning, M. R., thought that the *gratuitous* bailee would not be liable in any event for theft by his servants ([1965] 3 W.L.R. 276 at p. 282; Diplock, L. J., expressly left the point open (at p. 292). To the extent that a gratuitous bailee *has* a duty "of safe-keeping", it ought to follow that he is equally liable for the default of his servants in discharging that duty.

33. For a recent application of this in Canada, see *Bamert* v. *Parks* (1964) 50 D.L.R. 2d. 313 (Ont. Co. Ct.): Janitor of car wash establishment returned after business hours, and took out a customer's car. The employer held not liable for damage caused to the car. In such a case, the bailor is only liable if he was negligent in hiring or retaining the employee.

of an employee to whom the duty of safe-keeping of the goods was entrusted.[34]

In *Morris* v. *C. W. Martin & Sons Ltd.* there was no effective exemption clause to protect the defendant,[35] but in the second case, *John Carter (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.*[36] the bailees, carriers, had a clause in the contract limiting their liability to a certain amount per gross cwt. "in respect of loss or damage . . . in any case." The goods in question were hi-jacked with the active co-operation of the defendant's driver, whom the dependent had hired without any real enquiry into his background.

Negligence was admitted, and the sole issue was whether the plaintiff could establish a fundamental breach of the contract, so as to deprive the defendant of the protection of the limitation clause. The plaintiff sought to do this in two ways, first by relying on an analogy from the law of carriage by sea to show a duty on the carrier, which was "prior" to the actual carriage and "personal" to the carrier, to provide an honest and competent driver and a roadworthy vehicle. Such an idea appears never to have been suggested before in the long history of land carriers, and the court was unconvinced.[37]

The second argument was that the theft by the driver was a deliberate and conscious repudiation of the duty of the carrier, and the defendant had thus *vicariously* repudiated the contract and was in fundamental breach. This also was rejected, the court saying, in effect, that a fundamental breach can never be committed vicariously.[38]

It has, of course, long been established that even a common carrier can lawfully contract out of liability for theft by his own servants[39] but that was before the doctrine of fundamental breach reached its present state of development. In view of the serious proportions which the amount of organized robbery has attained at the present day, it seems that there is a lot to be said for compelling the carrier to warrant at least the honesty of the employee to whom he has entrusted the care of the goods.[40]

A. D. HUGHES*

34. The defendant was in fact a sub-bailee, but was held to owe the same duty to the bailor as an ordinary bailee. Cf *Lee Cooper Ltd.* v. *C. H. Jenkins & Sons Ltd.* [1965] 3 W.L.R. 753—liability of carrier in tort for negligence at suit of the owner of the goods consigned, although the contract of carriage was made by forwarding agents acting as principals, and not on behalf of the owner.

35. One major difficulty in the defendant's path was that the plaintiff was not a party to the contract containing the exemption clause. Both Lord Denning, M. R., ([1965] 3 W.L.R. 276 (at p. 286) and Salmon, L. J. (at p. 296), inclined tentatively to the view that the plaintiff would have been bound by an appropriately worded exemption clause, on the ground that the bailor impliedly consents to the limitations of liability usual in the trade.

36. [1965] 2 W.L.R. 553.

37. Sellers, L. J., dissenting on this point.

38. [1965] 2 W.L.R. 553, especially at p. 568 (*per* Davies, L. J.): ". . . there must be something amounting to a deliberate breach of the contract which can be imputed to the contracting party personally." There is an apparent difficulty in applying this to the case of a corporate body, which cannot do anything "personally", but the difficulty is resolved by treating those servants of the company who have authority, actual or ostensible, to take decisions in the company's name as being the "person" for this purpose.

39. *Shaw* v. *G.W.R.* [1894] 1 Q.B. 373.

40. Leave to appeal to the House of Lords was granted in both cases.

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