AN

ESSAY

ON THE

Law of Bailments.

By WILLIAM JONES, Esq.
OF THE MIDDLE TEMPLE.

In tutelis, ſocietatibus, *fiduciis*, *mandatis*, rebus emptis-venditis, *conductis-locatis*, quibus vitæ ſocietas continetur, magni eſt judicis ſtatuere, (præſertim cum in pleriſque ſint judicia contraria) *quid quemque cuique præſtare* oporteat. Q. SCÆVOLA, apud CIC. de Offic. Lib. III.

From the Preſs
of Samuel Etheridge,
For JOHN WEST, No. 75,
Cornhill, BOSTON.

1796.

the ſame reſponſibility for neglect is juſtly demanded in any of the *innominate* contracts, or, whenever a valuable conſideration of any kind is given or ſtipulated. This is the caſe, where the contract *do ut des* is formed by a reciprocal bailment for uſe, as if *Robert* permit *Henry* to uſe his pleaſure-boat for a day, in conſideration that *Henry* will give him the uſe of his chariot for the ſame time; and ſo in ten thouſand inſtances that might be imagined of double bailments: this too is the caſe, if the abſolute property of one thing be given as an equivalent for the temporary or limited property of another, as if *Charles* give *George* a brace of pointers for the uſe of his hunter during the ſeaſon. The ſame rule is applicable to the contract *facio ut facias* where two perſons agree to perform reciprocal works; as if a maſon and a carpenter have each reſpectively undertaken to build an edifice, and they mutually agree, that the firſt ſhall finiſh all the maſonry, and the ſecond all the wood-work, in their reſpective buildings; but if a goldſmith make

a bargain

a bargain with an architect to give him a quantity of wrought plate for building him his houſe, this is the contract *do ut facias*, or *facio ut des*; and, in all theſe caſes, the bailees muſt anſwer for the omiſſion of ordinary diligence in preſerving the things, with which they are intruſted: ſo when *Jacob* undertook the care of *Laban*'s flocks and herds for no leſs a reward than his younger daughter, whom he loved ſo paſſionately, that ſeven years were in his eyes like a few days, he was bound to be juſt as vigilant, as if he had been paid in ſhekels of ſilver.

Now the obligation is preciſely the ſame as we have already hinted,(x) when a man takes upon himſelf the cuſtody of goods in conſequence and conſideration of another gainful contract; and though an innholder be not paid in money for ſecuring the traveller's trunk, yet the gueſt *facit ut faciat*, and alights at the inn, not ſolely for his own refreſhment, but

(x) P. 37. 38.

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HAVING lately had occaſion to examine with ſome attention the nature and properties of that contract, which lawyers call Bailment, or, *A delivery of goods on a condition, expreſſed or implied, that they ſhall be reſtored by the bailee to the bailor, or according to his directions, as ſoon as the purpoſe for which they were bailed, ſhall be anſwered,* I could not but obſerve with ſurpriſe, that a title in our Engliſh law which ſeems the moſt generally intereſting, ſhould be the leaſt generally underſtood, and the leaſt preciſely aſcertained. Hundreds and thouſands of men paſs through life, without knowing, or caring to know, any of the numberleſs

numberleſs niceties, which attend our abſtruſe, though elegant, ſyſtem of real property, and without being at all acquainted with that exquiſite logic, on which our rules of ſpecial pleading are founded; but there is hardly a man of any age or ſtation, who does not every week and almoſt every day contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depoſitary* or a perſon *depoſiting*, of a *commiſſioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more abſurd, as well as more dangerous, than frequently to be bound by duties, without knowing the nature or extent of them, and to enjoy rights, of which we have no juſt idea? Nor muſt it ever be forgotten, that the contracts above-mentioned are among the principal ſprings and wheels of civil ſociety; that, if a want of mutual confidence, or any other cauſe, were to weaken them or obſtruct their motion, the whole machine would inſtantly be diſordered or broken to pieces: preſerve them, and various accidents may ſtill deprive men of happineſs; but deſtroy them,

them, and the whole ſpecies muſt infallibly be miſerable. It ſeems therefore aſtoniſhing, that ſo important a branch of juriſprudence ſhould have been ſo long and ſo ſtrangely unſettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, *the doctrine of Bailments* ſhould have produced more contradictions and confuſion, more diverſity of opinion and inconſiſtency of argument, than any other part perhaps, of juridical learning; at leaſt, than any other part equally ſimple.

Such being the caſe, I could not help imagining, that a ſhort and perſpicuous diſcuſſion of this title, an expoſition of all our ancient and modern deciſions concerning it, an attempt to reconcile judgments apparently diſcordant, and to illuſtrate our laws by a compariſon of them with thoſe of other nations, together with an inveſtigation of their true ſpirit and reaſon, would not be wholly unacceptable to the ſtudent of *Engliſh* law; eſpecially as our excellent Blackſtone, who of all men was beſt able to throw the cleareſt light on this, as on every

other ſubject, has compriſed the whole doctrine in three paragraphs, which, without effecting the merit of his incomparable work, we may ſafely pronounce the leaſt ſatisfactory part of it; for he repreſents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of *a diſtinct ſpecies*; he ſays nothing of employment by *commiſſion*; he introduces the doctrine of a *diſtreſs*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great queſtion of *reſponſibility for neglect*, he ſpeaks ſo looſely and indeterminately, that no fixed ideas can be collected from his words *(a)*. His commentaries are the moſt correct and beautiful outline, that ever was exhibited of any human ſcience; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly ſoever it may be delineated, will make a geographer: if, indeed, all the titles, which he profeſſed only to ſketch in elementary diſcourſes, were filled up with exactneſs and perſpicuity, *Engliſhmen* might hope at length

(a) 2 Comm. 452, 453, 454.

length to poſſeſs a digeſt of their laws, which would leave but little room for controverſy, except in caſes depending on their particular circumſtances; a work, which every lover of humanity and peace muſt anxiouſly wiſh to ſee accompliſhed. The following eſſay (for it aſpires to no higher name) will explain my idea of ſupplying the omiſſions, whether deſigned or involuntary, in the Commentaries on the laws of England.

I propoſe to begin with treating the ſubject *analytically*, and, having traced every part of it up to the firſt principles of natural reaſon, ſhall proceed *hiſtorically*, to ſhow with what perfect harmony thoſe principles are recogniſed and eſtabliſhed by other nations, eſpecially the Romans, as well as by our Engliſh courts, when their deciſions are properly underſtood and clearly diſtinguiſhed; after which I ſhall reſume *ſynthetically* the whole learning of *bailments*, and expound ſuch rules, as, in my humble apprehenſion, will prevent any farther perplexity on this intereſting title, except in caſes peculiarly circumſtanced.

From

From the obligation, contained in the definition of bailment, *to reſtore the thing bailed at a certain time*, it follows, that the bailee muſt *keep* it, and be *reſponſible* to the bailor, *if it be loſt or damaged*; but, as the bounds of juſtice would in moſt caſes be tranſgreſſed, if he were made anſwerable for the loſs of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment*; and the inveſtigation of this *degree* in every particular contract is the problem, which involves the principal difficulty.

There are infinite ſhades of *care* or *diligence* from the ſlighteſt momentary thought, or tranſient glance of attention to the moſt vigilant anxiety and ſolicitude; but *extremes* in this caſe, as in moſt others are *inapplicable to practice*: the firſt extreme would ſeldom enable the bailee to perform the condition, and the ſecond ought not in juſtice to be demanded; ſince it would be harſh and abſurd to exact the ſame anxious care, which the greateſt miſer takes of his treaſure, from every man,

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who borrows a book or a ſeal. The degrees then of care, for which we are ſeeking, muſt lie ſomewhere between theſe extremes; and, by obſerving the different manners and characters of men, we may find a certain ſtandard, which will greatly facilitate our inquiry; for, although ſome are exceſſively careleſs, and others only at particular times, yet we perceive, that *the generality of rational men* uſe nearly the ſame degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every perſon of common prudence and capable of governing a family* takes of *his own* concerns, is a proper meaſure of that, which would uniformly be required in performing every contract, if there were not ſtrong reaſons for *exacting* in ſome of them a *greater* and *permitting* in others a *leſs*, degree of attention. Here then we may fix a conſtant determinate point, on each ſide of which there is a ſeries conſiſting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the caſe admits of indulgence or demands rigour: if the conſtruc-

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tion be *favourable*, a degree of care *leſs* than the ſtandard will be ſufficient; if *rigorous*, a degree *more* will be required; and, in the firſt caſe, the meaſure will be that care, which *every man of common ſenſe, though abſent and inattentive*, applies to his own affairs; in the ſecond, the meaſure will be that attention, which a man *remarkably exact and thoughtful* gives to the ſecuring of his perſonal property.

The fixed mode or ſtandard of diligence I ſhall (for want of an apter epithet) invariably call Ordinary; although that word is equivocal, and ſometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried uſe of the word in one ſenſe will prevent the leaſt obſcurity. The degrees on each ſide of the ſtandard, being indeterminate, need not be diſtinguiſhed by any preciſe denomination: the firſt may be called leſs, and the ſecond, more, than Ordinary diligence.

Superlatives are exactly true in mathematics; they approach to truth in abſtract morality; but in practice and actual life they are commonly

monly falſe: they are often, indeed, uſed for mere *intenſives*, as the *moſt diligent* for *very diligent*; but this is a rhetorical figure; and, as rhetoric, like her ſiſter poetry, delights in fiction, her language ought never to be adopted in ſober inveſtigations of truth: for this reaſon I would reject from the preſent inquiry all ſuch expreſſions as *the utmoſt care*, *all poſſible*, or *all imaginable*, *diligence*, and the like, which have been the cauſe of many errors in the code of ancient Rome, whence, as it will ſoon be demonſtrated, they have been introduced into our books even of high authority.

Juſt in the ſame manner, there are infinite ſhades of *default* or *neglect*, from the ſlighteſt inattention or momentary abſence of mind to the moſt reprehenſible ſupineneſs and ſtupidity: theſe are the omiſſions of the before-mentioned degrees of diligence, and are exactly correſpondent with them. Thus the omiſſion of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each ſide of which is a ſeries of variable

riable modes of default infinitely diminiſhing, in proportion as their oppoſite modes of care infinitely increaſe; for the want of extremely great care is an extremely little fault, and the want of the ſlighteſt attention is ſo conſiderable a fault, that it almoſt changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of truſt and a deviation from common honeſty. This known or fixed point of negligence is therefore a mean between *fraud* and *accident*, and, as the increaſing ſeries continually approaches to the firſt extreme, without ever becoming preciſely equal to it, until the laſt term melts into it or vaniſhes, ſo the decreaſing ſeries continually approximates to the ſecond extreme, and at length becomes nearer to it than any aſſignable difference: but the laſt terms being, as before, excluded, we muſt look within them for modes applicable to practice; and theſe we ſhall find to be the omiſſions of ſuch care as *a man of common ſenſe, however inattentive*, and of ſuch as a *very cautious and vigilant* man reſpectively take of *their own poſſeſſions*.

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The conſtant, or fixed, mode of *default* I likewiſe call Ordinary, not meaning by that epithet to diminiſh the culpability of it, but wanting a more appoſite word, and intending to uſe this word uniformly in the ſame ſenſe: of the two variable modes the firſt may be called greater, and the ſecond, leſs, than ordinary, or the firſt groſs, and the other, ſlight neglect.

It is obvious, that a bailee of common honeſty, if he alſo have common prudence, would not be *more* negligent *than ordinary* in keeping the thing bailed: ſuch negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not leſs obvious, though leſs pertinent to the ſubject, that infinite degrees of *fraud* may be conceived increaſing in a ſeries from the term, where *groſs neglect* ends, to a term, where poſitive crime begins; as *crimes* likewiſe proceed gradually from the ſlighteſt to the moſt attrocious; and, in the ſame manner, there

are infinite degrees of *accident* from the limit of extremely ſlight neglect to a *force irreſiſtible* by any human power. Law, as a practical ſcience, cannot take notice of melting lines, nice diſcriminations, and evaneſcent quantities: but it does not follow, that *neglect*, *deceit* and *accident*, are to be conſidered as indiviſible points, and that *no degrees whatever* on either ſide of the ſtandard are admiſſible in legal diſquiſitions.

Having diſcovered the ſeveral modes of *diligence*, which may juſtly be demanded of contracting parties, let us inquire in what particular caſes a bailee is by natural law bound to uſe them, or to be anſwerable for the omiſſion of them.

When the contract is *reciprocally beneficial to both parties*, the obligation hangs in an even balance; and there can be no reaſon to recede from the ſtandard: nothing more, therefore, ought in that caſe to be required than *ordinary diligence*, and the bailee ſhould be reſponſible for no more than *ordinary neglect*; but it is very

very different, both in reaſon and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjuſt to require any particular trouble from the *bailee*, who ought not to be moleſted unneceſſarily for his obliging conduct: if more, therefore, than *good faith* were exacted from ſuch a perſon, that is, if he were to be made anſwerable for leſs than *groſs* neglect few men after one or two examples, would accept goods on ſuch terms, and ſocial comfort would be proportionably impaired.

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reaſonable that he, *who receives the benefit, ſhould bear the burden*, but if he were not obliged to be *more than ordinarily* careful, and bound to anſwer even for *ſlight* neglect, few men (for acts of pure generoſity and friendſhip are not here to be ſuppoſed) would part with their goods for the mere advantage of another,

other, and much convenience would conſequently be loſt in civil ſociety.

This diſtinction is conformable not only to natural reaſon, but alſo, by a fair preſumption, to the *intention of the parties*, which conſtitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expreſſed*, the rule (as in deviſes) yields to it; and a bailee without benefit may, by a ſpecial undertaking, make himſelf liable for *ordinary*, or *ſlight* neglect, or even for inevitable *accident*: hence, as an agreement, *that a man may ſafely be diſhoneſt*, is repugnant to decency and morality, and, as no man ſhall be *preſumed* to bind himſelf againſt *irreſiſtible force*, it is a juſt rule, that *every* bailee is reſponſible for *fraud*, even *though* the contrary be ſtipulated, but that *no* bailee is reſponſible for *accident*, *unleſs* it be moſt expreſsly ſo agreed.

The plain elements of natural law, on the ſubject of reſponſibility for neglect, having been

been traced by this ſhort analyſis, I come to the ſecond, or *hiſtorical*, part of my eſſay; in which I ſhall demonſtrate, after a few introductory remarks, that a perfect harmony ſubſiſts on this intereſting branch of juriſprudence in the codes of nations moſt eminent for legal wiſdom, particularly of the Romans and the Engliſh.

Of all known laws the moſt ancient and venerable are thoſe of the Jews; and among the *Moſaic* inſtitutions we have ſome curious rules on the very ſubject before us; but, as they are not numerous enough to compoſe a ſyſtem, it will be ſufficient to interweave them as we go along, and explain them in their proper places: for a ſimilar reaſon, I ſhall ſay nothing here of the *Attic* laws on this title, but ſhall proceed at once to that nation, by which the wiſdom of Athens was eclipſed, and her glory extinguiſhed.

The deciſions of the old Roman lawyers, collected and arranged in the ſixth century by the order of Juſtinian, have been for ages, and

in ſome degree ſtill are, in bad odour among Engliſhmen: this is an honeſt prejudice, and flows from a laudable ſource; but a prejudice, moſt certainly, it is, and, like all others, may be carried to a culpable exceſs.

The conſtitution of Rome was originally excellent; but, when it was *ſettled*, as hiſtorians write, *by* Auguſtus, or, in truer words, when that baſe diſſembler and cold-blooded aſſaſſin *C. Octavius* gave law to millions of honeſter, wiſer, and braver men than himſelf by the help of a profligate army and an abandoned ſenate, the new form of government was in itſelf abſurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the ſtate both executive and legiſlative, was a tyrannous ordinance, with the name only, not the nature, of law: *(b)* had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *ſons* of thoſe who conſented to it; for "a renunciation of *perſonal* rights, eſpecially rights

(b) D. 1. 4. 1. 5.

rights of the higheſt nature, can have no operation beyond the *perſons* of thoſe, who renounce them." Yet, iniquitous and odious as the *ſettlement* of the conſtitution was, Ulpian only ſpoke in conformity to it, when he ſaid that "the will of the prince had the force of law;" that is, as he afterwards explains himſelf, *in the* Roman *empire;* for he neither meaned, nor could be mad enough to mean, that the propoſition was juſt or true as a general maxim. So congenial, however, was this rule or ſentence, ill underſtood and worſe applied, to the minds of our early Norman kings, that ſome of them, according to Sir John Forteſcue, "were not pleaſed with their own laws, but exerted themſelves to introduce the civil laws of *Rome* into the government of England; (*c*)" and ſo hateful was it to our ſturdy anceſtors, that, if John of Saliſbury be credited, "they burned and tore all ſuch books of civil and canon law as fell into their hands: (*d*)" but this was intemperate zeal; and it

(*c*) De Laud. Leg. Angl. c. 33, 34.
(*d*) Seld. *in* Fort. c. 33.

it would have been ſufficient to improbate the *public*, or *conſtitutional*, maxims of the *Roman* imperial law, as abſurd in themſelves as well as inapplicable to our free government, without rejecting the whole ſyſtem of *private* juriſprudence as incapable of anſwering even the purpoſe of illuſtration. Many *poſitive* inſtitutions of the *Romans* are demonſtrated by Forteſcue, with great force, to be far ſurpaſſed in juſtice and ſenſe by our own immemorial cuſtoms; and the reſcripts of Severus or Caracalla, which were laws, it ſeems, at *Rome*, have certainly no kind of authority at *Weſtminſter*; but, in queſtions of *rational* law, no cauſe can be aſſigned, why we ſhould not ſhorten our own labour by reſorting occaſionally to the wiſdom of ancient juriſts, many of whom were the moſt ingenious and ſagacious of men. What is good ſenſe in one age muſt be good ſenſe, all circumſtances remaining, in another; and pure unſophiſticated reaſon is the ſame in Italy and in England, in the mind of a Papinian and of a Blackſtone.

Without

Without undertaking, therefore, in all inſtances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celſus or with himſelf, I ſhall proceed to exhibit a ſummary of the *Roman* law on the ſubject of *reſponſibility for neglect*.

The two great ſources, whence all the deciſions of civilians on this matter muſt be derived, are *two* laws of Ulpian; the firſt of which is taken from his work on *Sabinus*, and the ſecond from his tract on the Edict: of both theſe laws I ſhall give a verbal tranſlation according to my apprehenſion of their obvious meaning, and ſhall then ſtate a very learned and intereſting controverſy concerning them, with the principal arguments on each ſide, as far as they tend to elucidate the queſtion before us.

"Some contracts, ſays the great writer on *Sabinus*, make the party reſponſible for deceit only; ſome, for both deceit and neglect, nothing more than *reſponſibility for* deceit *is demanded* in depoſits and poſſeſſion at will; both

deceit

deceit and neglect *are inhibited* in commiſſions, lending for uſe, cuſtody after ſale, taking in pledge, hiring; alſo in portions, guardianſhips, voluntary work: (among theſe ſome *require* even *more than ordinary* diligence). Partnerſhip and undivided property make *the partner and joint proprietor* anſwerable for both deceit and negligence. *(e)*"

"In contracts, ſays the ſame author in his other work, we are ſometimes reſponſible for deceit alone; ſometimes, for neglect alſo; for deceit only in depoſits; becauſe, ſince no benefit accrues to the depoſitary, he can juſtly be anſwerable for no more than deceit; but, if a reward happen to be given, then *a reſponſibility* for neglect alſo is required; or if it be agreed at the time of the contract, that the depoſitary ſhall

(e) Contractûs quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam. Dolum tantùm depoſitum et precarium; dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum; item dotiſdatio, tutelæ, negotia geſta: (in his quidam et diligentiam.) Societas et rerum communio et dolum et culpam recipit. D. 50. 17. 23.

ſhall anſwer both for neglect and for accident: but, where a benefit accrues to both parties, as in keeping a thing ſold, as in hiring, as in portions, as in pledges, as in partnerſhip, both deceit and neglect make the party liable. Lending for uſe, indeed, is for the moſt part beneficial to the borrower only: and, for this reaſon, the better opinion is that of Q. MUCIUS, who thought, that he ſhould be reſponſible not only for neglect, but even for the omiſſion of *more than ordinary* diligence.*(f)*"

One

(f) In contractibus interdum dolum ſolum, interdum et culpam, præſtamus; dolum in depoſito; nam, quia nulla utillitas ejus verſatur, apud quem deponitur, merito dolus præſtatur ſolus; niſi forte et merces acceſſit, tunc enim, ut eſt et conſtitutum, etiam culpa exhibetur; aut ſi hoc ab initio convenit, ut et culpam et periculum præſtet is, penes quem deponitur: ſed, ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in ſocietate, et dolus et culpa præſtatur. Commodatum autem plerumque ſolam utilitatem continet ejus, cui commodatur; et ideo verior eſt Q. Mucii ſententia exiſtimantis et culpam præſtandam et diligentiam. D. 13. 6. 5. 2.

One would ſcarce have believed it poſſible, that there could have been two opinions on laws ſo perſpicuous and preciſe, compoſed by the ſame writer, who was indubitably the beſt expoſitor of his own doctrine, and apparently written in illuſtration of each other; the firſt compriſing the rule, and the ſecond containing the reaſon of it: yet the ſingle paſſage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in *Latin*,(g) one or two in *Greek*,(h) and ſome in the *modern* languages of Europe, beſides the general expoſitions of that important part of the digeſt in which it is preſerved. Moſt of theſe I have peruſed with more admiration of human ſagacity and induſtry than either ſolid inſtruction or rational entertainment; for theſe

(g) Bocerus, Campanus, D'Avezan, Del Rio, Le Conte, Ritterſhuſius, Giphanius, J. Godefroi, and others.

(h) The ſcholium on *Harmenopulus*, l. 6. tit. de Reg. Jur. n. 55. may be conſidered as a commentary on this law.

theſe authors, like the generality of commentators treat one another very roughly on very little provocation, and have the art rather of clouding texts in themſelves clear, than of elucidating paſſages, which have any obſcurity in the words or the ſenſe of them. CAMPANUS, indeed, who was both a lawyer and a poet, has turned the firſt law of *Ulpian* into *Latin* hexameters; and his authority, both in proſe and verſe, confirms the interpretation, which I have juſt given.

The chief cauſes of all this perplexity have been, firſt, the vague and indiſtinct manner in which the old *Roman* lawyers, even the moſt eminent, have written on the ſubject; ſecondly, the looſe and equivocal ſenſe of the words *diligentia* and *culpa*; laſtly and principally, the darkneſs of the parenthetical clauſe, *in his quidam et diligentiam*, which has produced more doubt, as to its true reading and ſignification, than any ſentence of equal length in any author *Greek* or *Latin*. Minute as the queſtion concerning this clauſe may ſeem, and dry as it

certainly is, a ſhort examination of it appears abſolutely neceſſary.

The vulgate editions of the pandects, and the manuſcripts, from which they were printed, exhibit the reading above ſet forth; and it has accordingly been adopted by CUJAS, P. FABER, LE CONTE, DONELLUS, and *moſt* others, as giving a ſenſe both perſpicuous in itſelf and conſiſtent with the ſecond law; but the Florentine copy has *quidem*, and the copies, from which the *Baſilica* were tranſlated three centuries after JUSTINIAN, appear to have contained the ſame word, ſince the *Greeks* have rendered it by a particle of ſimilar import. This variation in a ſingle letter makes a total alteration in the whole doctrine of ULPIAN; for, *if* it be agreed, that *diligentia* means, by a figure of ſpeech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the ſecond law before cited, that "ſome of the preceding contracts demand that higher degree;" but the *Florentine* reading will denote, in contradiction

tradiction to it, that "all of them require more than ordinary exertions."

It is by no means my deſign to depreciate the authority of the venerable manuſcript preſerved at *Florence*; for, although few civilians, I believe, agree with POLITIAN, in ſuppoſing it to be one of the *originals*, which were ſent by *Juſtinian* himſelf to the principal towns of *Italy*,(*i*) yet it may *poſſibly* be the very book, which the Emperor LOTHARIUS II. is *ſaid* to have found at *Amalfi*, about the year 1130, and gave to the citizens of Piſa, from whom it was taken near three hundred years after, by the *Florentines*, and has been kept by them with ſuperſtitious reverence:(*k*) be that as it may, the copy deſerves the higheſt reſpect; but if any proof be requiſite, that it is *no faultleſs* tranſcript, we may obſerve, that, in the very law before us, *accedunt* is erroneouſly written for *accidunt*; and the whole phraſe, indeed, in which that

(*i*) Epiſt. x. 4. Miſcell. cap. 41. See Gravina, lib. i. § 141.

(*k*) Taurelli, Præf. ad Pand. Florent.

that word occurs, is different from the copy uſed by the *Greek* interpreters, and conveys a meaning, as Bocerus and others have remarked, not ſupportable by any principle or analogy.

This, too, is indiſputably clear; that the ſentence, *in his* quidem *et diligentiam*, is ungrammatical, and cannot be conſtrued according to the interpretation, which ſome contend for. What verb is underſtood? *Recipiunt*. What noun? *Contractûs*. What then becomes of the words *in his*, namely *contractibus*, unleſs *in* ſignify *among?* And, in that caſe, the difference between *quidem* and *quidam* vaniſhes; for the clauſe may ſtill import, that "among the preceding contracts (that is, *in* ſome *of them)*, more than uſual diligence is exacted:" in this ſenſe the *Greek* prepoſition ſeems to have been taken by the ſcholiaſt on Harmenopulus; and it may here be mentioned, that *diligentia*, in the nominative, appears in ſome old copies, as the *Greeks* have rendered it; but Accurſius, Del Rio, and a few others, conſider

conſider the word as implying no more than diligence *in general*, and diſtinguiſh it into various *degrees* applicable to the ſeveral contracts, which Ulpian enumerates. We may add, that one or two interpreters, thus explain the whole ſentence, "in his *contractibus* quidam *juriſconſulti* et diligentiam *requirunt*," but this interpretation, if it could be admitted, would entirely deſtroy the authority of the clauſe, and imply, that *Ulpian* was of a different opinion. As to the laſt conjecture, that only *certain caſes* and *circumſtances* are meaned by the word *quidam*, it ſcarce deſerves to be repeated. On the whole, I ſtrongly incline to prefer the vulgate reading, eſpecially as it is not conjectural, but has the authority of manuſcripts to ſupport it; and the miſtake of a letter might eaſily have been made by a tranſcriber, whom the prefaces, the epigram prefixed, and other circumſtances, prove to have been, as *Taurelli* himſelf admits, a *Greek*. Whatever, in ſhort, be the genuine words of this much-controverted clauſe, I am perſuaded, that it ought by no means to be ſtrained into

an inconſiſtency with the *ſecond* law; and this has been the opinion of *moſt* foreign juriſts from Azo and Alciat down to Heineccius and Huber; who, let their diſſenſion be, on other points, ever ſo great, think alike in diſtinguiſhing *three degrees*, of neglect, which we may term *groſs*, *ordinary*, and *ſlight*, and in demanding reſponſibility for thoſe degrees according to the rule before expounded.

The law then on this head, which prevailed in the ancient *Roman* empire, and ſtill prevails in *Germany*, *Spain*, *France*, *Italy*, *Holland*, conſtituting, as it were, a part of the law of nations, is in ſubſtance what follows.

Groſs neglect, *lata culpa*, or, as the *Roman* lawyers moſt accurately call it, *dolo proxima*, is in practice conſidered as equivalent to *dolus*, or *fraud*, itſelf; and conſiſts, according to the beſt interpreters, in the *omiſſion* of that care, *which even inattentive and thoughtleſs men never fail to take of their own property*: this fault they juſtly hold a violation of *good faith*.

Ordinary

Ordinary neglect, *levis culpa*, is the *want* of that diligence, which the *generality of mankind uſe in their own concerns*; that is, of *ordinary care*.

Slight neglect, *leviſſima culpa*, is the *omiſſion* of that care, which *very attentive and vigilant perſons take of their own goods*, or in other words, of *very exact diligence*.

Now, in order to aſcertain the degree of neglect, for which a man, who has in his poſſeſſion the goods of another, is made reſponſible by his contract, either *expreſs* or *implied*, civilians eſtabliſh *three* principles, which they deduce from the law of *Ulpian* on the *Edict*, and here it may be obſerved, that they frequently diſtinguiſh this law by the name of *Si ut certo*, and the other by that of *Contractus*;(*l*) as many poems and hiſtories in ancient languages

(*l*) Or l. 5. § 2, ff. *Commod.* and l. 23. ff. *de reg. jur.* Inſtead of *ff*, which is a barbarous corruption of the initial letter of πανδεκται, many write D for *Digeſt*, with more clearneſs and propriety.

languages are denominated from their *initial* words.

First: In contracts, which are beneficial *ſolely* to the owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is conſequently reſponſible for nothing leſs than *groſs* neglect; this, therefore, is the general rule in depoſits; but, in regard to commiſſions, or, as foreigners call them, mandates, and the *implied* contract *negotiorum geſtorum*, a certain care is requiſite from *the nature of the thing*; and, as *good faith* itſelf demands, that ſuch care be proportioned to the exigence of each particular caſe, the law *preſumes*, that the mandatary or commiſſioner, and, by parity of reaſon, the *negotiorum geſtor*, engaged at the time of contracting to uſe a degree of diligence *adequate to the performance of the work undertaken.(m)*

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in thoſe of ſale, hiring, pledging,

(m) Spondet diligentiam, ſay the *Roman* lawyers, *gerendo negotio parem.*

pledging, partnerſhip, and the contract implied in joint property, ſuch care is exacted, as *every prudent man commonly takes of his own goods;* and, by conſequence, the *vender*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are anſwerable for ordinary neglect.

Thirdly: In contracts from which a benefit accrues *only* to him, who has the goods in his cuſtody, as in that of lending for uſe, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore, reſponſible for *ſlight* negligence.

This had been the learning generally, and almoſt unanimouſly received and taught by the doctors of *Roman* law; and it is very remarkable, that even Antoine Favre, or *Faber*, who was famed for innovation and paradox, who publiſhed two ample volumes *De Erroribus Interpretum*, and whom Gravina juſtly calls the *boldeſt of expoſitors and the keeneſt adverſary of the practiſers*,(n) diſcovered no error in the common

(n) Orig. Jur. Civ. lib. i. § 183.

common interpretation of two celebrated laws, which have ſo direct and ſo powerful an influence over ſocial life, and which he muſt repeatedly have conſidered: but the younger Godefroi of *Geneva*, a lawyer confeſſedly of eminent learning, who died about the middle of the laſt century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the ſentiments of all his predeceſſors, and even of the ancient *Romans*, and endeavours to ſupport a new ſyſtem of his own.

He adopts, in the firſt place, the *Florentine* reading, of which the ſtudent, I hope, has formed by this time a decided opinion from a preceding page of this eſſay.

He cenſures the rule compriſed in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and ſupport of Modeſtinus, of Paulus, of Africanus, of Gaius, and of the great Papinian himſelf; nor does he ſatisfactorily prove

prove the *fallaciouſneſs*, to which he objects, unleſs every rule be fallacious, to which there are ſome exceptions. He underſtands by Diligentia that care, which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the diſputed clauſe: in the *two*, which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above ſtated, and uſes the common epithets *levis* and *leviſſima*; but, in order to reconcile his ſyſtem with many laws, which evidently oppoſe it, he aſcribes to the old lawyers the wildeſt mutability of opinion, and is even forced to contend, that Ulpian himſelf *muſt have changed his mind.*

Since his work was not publiſhed, I believe in his life-time, there may be reaſon to ſuſpect, that he had not completely ſettled his *own* mind; and he concludes, indeed, with referring the deciſion of every caſe on this head

head to that moſt dangerous and moſt tremendous power, *the diſcretion of the judge.(o)*

The triple diviſion of neglects had alſo been highly cenſured by ſome lawyers of reputation. Zaſius had very juſtly remarked, that neglects differed in *degree*, but not in *ſpecies*; adding, "that he had no objection to the uſe of the words *levis* and *leviſſima*, merely as terms of practice adopted in courts, for the more eaſy diſtinction between the different degrees of care exacted in the performance of different contracts :*(p)*" but Donellus, in oppoſition to his maſter *Duaren*, inſiſted that *levis* and *leviſſima* differed in ſound only, not in ſenſe; and attempted to prove his aſſertion triumphantly by a regular ſyllogiſm ;*(q)* the minor propoſition

(o) "Ego certè hac in re cenſentibus accedo, vix quidquam generaliùs definiri poſſe; remque hanc ad *arbitrium judicis*, prout res eſt, referendam." p. 141.

(p) Zas. *Singul. Reſp.* lib. i. cap. 2.

(q) "Quorum definitiones eædem ſunt, ea inter ſe ſunt eadem; *levis* autem culpæ et *leviſſimæ* una et eadem definitio eſt: utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

tion of which is raiſed on the figurative and inaccurate manner, in which poſitives are often uſed for ſuperlatives, and converſely, even by the beſt of the old *Roman* lawyers. True it is, that, in the law *Contractus*, the diviſion appears to be *twofold* only, dolus and culpa; which differ in *ſpecies*, when the firſt means *actual fraud and malice*, but in *degree* merely, when it denotes no more than *groſs neglect*; and, in either caſe, the ſecond branch, being capable of *more* and *leſs*, may be ſubdivided into *ordinary* and *ſlight*; a ſubdiviſion, which the law *Si ut certo* obviouſly requires: and thus are both laws perfectly reconciled.

We may apply the ſame reaſoning, changing what ſhould be changed, to the *triple* diviſion of *diligence*; for, when *good faith* is conſidered as implying at leaſt the exertion of *ſlight* attention, the other branch, *Care*, is ſubdiviſible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already eſtabliſhed both by the analyſis and by authority.

Nevertheleſs,

Nevertheleſs, a ſyſtem, in one part entirely new, was broached in the preſent century by an advocate in the parliament of Paris, who may, probably, be now living, and poſſibly in that profeſſional ſtation, to which his learning and acuteneſs juſtly entitle him. I ſpeak of M. Le Brun, who publiſhed, not many years ago, an *Eſſay on Reſponſibility for Neglect*,(r) which he had nearly finiſhed, before he had ſeen the commentary of *Godefroi*, and, in all probability, without ever being acquainted with the opinion of *Donellus*.

This author ſharply reproves the *triple* diviſion of neglects, and ſeems to diſregard the rule concerning a benefit ariſing to *both*, or to *one*, of the contracting parties; yet he charges *Godefroi* with a want of due clearneſs in his ideas, and with a palpable miſinterpretation of ſeveral laws. He reads *in his quidem et diligentiam*; and that with an air of triumph; inſinuating, that *quidam* was only an artful conjecture

(r) *Eſſai ſur la Preſtation des Fautes*, à Paris, chez Saugrain, 1764.

ture of *Cujas* and *Le Conte*, for the purpoſe of eſtabliſhing *their* ſyſtem; and he ſupports *his own* reading by the authority of the Baſilica; an authority, which, on another occaſion, he depreciates. He derides the abſurdity of *permitting negligence* in any contract, and urges, that ſuch *permiſſion*, as he calls it, is againſt expreſs law: "now, ſays he, where a contract is beneficial to both parties, the doctors permit *ſlight* negligence, which, how ſlight ſoever, is ſtill *negligence*, and ought always to be inhibited." He warmly contends, that the Roman laws, properly underſtood, admit only *two* degrees of diligence; one, meaſured by that, which *a provident and attentive father of a family* uſes in his own concerns; another, by that care, which the *individual party*, of whom it is required, *is accuſtomed to take of his own poſſeſſions*; and he, very ingeniouſly, ſubſtitutes a new rule in the place of that which he rejects; namely, that, *when the things in queſtion are the* ſole *property of the perſon, to whom they muſt be reſtored*, the holder of them is obliged to keep them with the *firſt* degree of diligence; whence

he

he decides, that a *borrower* and a *hirer* are reſponſible for preciſely the ſame neglect; that a vender, who retains for a time the cuſtody of the goods ſold, is under the ſame obligation, in reſpect of care, with a man, who undertakes to manage the affairs of another, either *without* his requeſt, as a *negotiorum geſtor*, or *with* it as a *mandatary*: "but ſays he, *when the things are the* joint *property of the parties contracting*, no higher diligence can be required than the ſecond degree, or that, which the *acting party* commonly uſes in *his own* affairs; and it is ſufficient, *if he keep them as he keeps his own.*" This he conceives to be the diſtinction between the *eight* contracts, which precede, and the *two*, which follow, the words *in his quidem et diligentiam.*

Throughout his work he diſplays no ſmall ſagacity and erudition, but ſpeaks with too much confidence of his own deciſions, and with too much aſperity or contempt of all other interpreters from Bartolus to Vinnius.

At

At the time when this author wrote, the learned M. Pothier was compoſing ſome of his admirable *treatiſes* on all the different ſpecies of expreſs, or implied, *contracts*; and here I ſeize with pleaſure an opportunity of recommending thoſe treatiſes to the *Engliſh* lawyer, exhorting him to read them again and again; for, if his great maſter Littleton has given him, as it muſt be preſumed, a taſte for luminous method, appoſite examples, and a clear manly ſtyle, in which nothing is redundant, nothing deficient, he will ſurely be delighted with works, in which all thoſe advantages are combined, and the greateſt portion of which is law at *Weſtminſter* as well as at *Orleans*: (s) for my own part, I am ſo charmed with them, that, if my undiſſembled fondneſs for the ſtudy of juriſprudence were never to produce any greater benefit to the public, than barely the introduction of Pothier to the acquaintance of my

(s) *Oeuvres de M. Pothier*, à Paris chez Debure: 28 volumes in *duodecimo*, or 6 in quarto. The illuſtrious author died in 1772.

my countrymen, I ſhould think that I had in ſome meaſure diſcharged the debt, which *every man*, according to lord Coke, *owes to his profeſſion*.

To this venerable profeſſor and judge, for he had ſuſtained both characters with deſerved applauſe, Le Brun ſent a copy of his little work; and M. Pothier honoured it with a ſhort, but complete, anſwer in the form of a *General Obſervation on his Treatiſe*;(t) declaring, at the ſame time, that *he would not enter into a literary conteſt*, and apologizing for his fixed adherence to the ancient ſyſtem, which he politely aſcribes to *the natural bias of an old man in favour of opinions formerly imbibed*. This is the ſubſtance of his anſwer: "that he can diſcover no kind of abſurdity in the uſual diviſion of *neglect* and *diligence*, nor in the *rule*, by which different *degrees* of them are applied to different contracts; that, to ſpeak with ſtrict

(t) It is printed apart, in *fourteen* pages, at the end of his treatiſe on the *Marriage contract*.

ſtrict propriety, negligence is not *permitted* in any contract, but *a leſs rigorous conſtruction* prevails in ſome than in others; that a *hirer*, for inſtance, is not conſidered as *negligent*, when he takes the ſame care of the goods hired, which the generality of mankind take of their own; that the *letter to hire*, who has his reward, muſt be preſumed to have demanded at firſt no higher degree of diligence, and cannot juſtly complain of that *inattention*, which in another caſe might have been culpable; for a *lender*, who has *no* reward, may fairly exact from the borrower that *extraordinary* degree of care, which *a very attentive perſon of his age and quality* would certainly have taken; that the diligence, which *the* individual *party commonly uſes in his own affairs*, cannot properly be the object of judicial inquiry; for *every* truſtee, adminiſtrator, partner or co-proprietor, muſt be *preſumed* by the court, auditors, or commiſſioners, before whom an account is taken, or a diſtribution or partition made, to uſe in *their own* concerns ſuch diligence, as is commonly uſed by *all prudent men*; that it is a violation

violation of *good faith* for any man to take leſs care of another's property, which has been intruſted to him, *than of his own* ; that, conſequently, the author of the new ſyſtem demands, no more of a *partner* or *joint-owner* than of a *depoſitary*, who is bound to keep the goods depoſited *as he keeps his own;* which is directly repugnant to the indiſputable and undiſputed ſenſe of the law *Contractus.*"

I cannot learn whether M. Le Brun ever publiſhed a reply, but am inclined to believe, that his ſyſtem has gained very little ground in *France*, and that the old interpretation continues univerſally admitted on the continent both by theoriſts and practiſers.

Nothing material can be added to Pothier's argument, which, in my humble opinion, is unanſwerable ; but it may not be wholly uſeleſs to ſet down a few general remarks on the controverſy : particular obſervations might be multiplied without end.

The

The only *eſſential* difference between the ſyſtems of Godefroi and Le Brun relates to the *two* contracts, which follow the much diſputed clauſe; for the *Swiſs* lawyer makes the partner and co-proprietor anſwerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honeſty*; now, in this reſpect, the error of the *ſecond* ſyſtem, has been proved to demonſtration; and the author of it himſelf confeſſes ingenuouſly, that the other part of it fails in the article of *Marriage-portions.(u)*

In regard to the diviſion of neglect and care into *three* degrees or *two*, the diſpute appears to be merely verbal; yet, even on this head, Le Brun ſeems to be ſelf-confuted: he begins with engaging to prove "that only *two* degrees of fault are diſtinguiſhed by the laws of *Rome*," and ends with drawing a concluſion, that they acknowledge but *one* degree; now, though this might be only a ſlip, yet the whole tenor

(u) See p. 71, note, and p. 126.

tenor of his book eſtabliſhes *two* modes of *diligence*, the *omiſſions* of which are *as many* neglects; excluſively of *groſs* neglect, which he likewiſe admits, for the *culpa leviſſima*, only is that which he repudiates. It is true that he gives no epithet or name to the omiſſion of his *ſecond* mode of care; and, had he ſearched for an epithet, he could have found no other than *groſs*; which would have demonſtrated the weakneſs of his whole ſyſtem.*(v)*

The diſquiſition amounts in fact to this: from the barrenneſs or *poverty*, as Lucretius calls it, of the *Latin* language, the ſingle word *culpa* includes, as a generic term, various degrees or ſhades of *fault*, which are ſometimes diſtinguiſhed by epithets and ſometimes left without any diſtinction but the *Greek*, which is rich and flexible, has a term expreſſive of almoſt every ſhade, and the tranſlators of the law *Contractus* actually uſe the word ῥαθυμία and ἀμέλεια, which are by no means ſynonymous, the former implying a certain *eaſineſs of mind* or

(v) See Pages, 32. 73. 74. 149.

or *remiſſneſs of attention*, while the ſecond imports a higher and more culpable degree of *negligence.(w)* This obſervation, indeed, ſeems to favour the ſyſtem of *Godefroi*; but I lay no great ſtreſs on the mere words of the tranſlation, as I cannot perſuade myſelf that the *Greek* juriſts under Baſilus and Leo, were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reaſons, as I hope, it has been proved, for rejecting all ſyſtems but that, which Pothier has recommended and illuſtrated.

I come now to the laws of our own country, in which the ſame diſtinctions and the ſame rules, notwithſtanding a few claſhing authorities, will be found to prevail; and here I might proceed chronologically from the oldeſt

(w) Baſilica, 2. 3. 23. See *Demoſth.* 3 Phil. *Reiſke's* edit. I. 112, 3. For *leviſſima culpa*, which occurs but once in the whole body of *Roman* law, *βαθυμία* ſeems the proper word in *Greek*; and it is actually ſo uſed in the *Baſilica*, 60. 3. 5. where mention is made of the *Aquilian* law, *in quâ*, ſays Ulpian, *et leviſſima culpa venit* D. 9. 2. 44.

eſt *Year-book* or *Treatiſe* to the lateſt adjudged *Caſe*; but, as there would be a moſt unpleaſing dryneſs in that method, I think it better to examine ſeparately every diſtinct *ſpecies* of bailment, obſerving at the ſame time, under each head, a kind of hiſtorical order. It muſt have occurred to the reader, that I might eaſily have taken a wider field, and have extended my inquiry to every poſſible caſe, in which a man *poſſeſſes for a time the goods of another*; but I choſe to confine myſelf within certain limits, leſt, by graſping at too vaſt a ſubject, I ſhould at laſt be compelled, as it frequently happens, by accident or want of leiſure, to leave the whole work unfiniſhed: it will be ſufficient to remark, that the rules are in general the ſame, by whatever means the goods *are legally* in the hands of the poſſeſſor, whether by delivery from the owner, which is a proper bailment, or from any other perſon, by finding,(*x*) or in conſequence of ſome diſtinct contract.

Sir

(*x*) Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141, 1. Leon. 224. 1 Cro. 219, *Mulgrave* and *Ogden*.

Sir John Holt, whom every *Engliſh* man ſhould mention with reſpect, and from whom no *Engliſh* lawyer ſhould venture to diſſent without extreme diffidence, has taken a comprehenſive view of this whole ſubject in his judgment on a celebrated caſe, which ſhall ſoon be cited at length; but, highly as I venerate his deep learning and ſingular ſagacity, I ſhall find myſelf conſtrained, in ſome few inſtances, to differ from him, and ſhall be preſumptuous enough to offer a correction or two in part of the doctrine which he propounds in the courſe of his argument.(y)

His diviſion of bailments into *ſix* ſorts appears, in the firſt place, a little inaccurate; for, in truth, his *fifth* ſort is no more than a branch of his *third*, and he might with equal reaſon have added a *ſeventh*, ſince the fifth is capable of another ſubdiviſion. I acknowledge, therefore, but *five* ſpecies of bailment; which I ſhall now enumerate and define, with all the *Latin* names,

(y) Lord Raym. 912.

names, one or two of which lord *Holt* has omitted. 1. Depoſitum, which is a naked bailment, without reward, of goods, to be *kept* for the bailor. 2. Mandatum, or *commiſſion;* when the mandatary undertakes, without recompenſe, to *do ſome act* about the things bailed, or ſimply to *carry* them; and hence Sir Henry Finch divides bailment into *two* ſorts, to *keep*, and to *employ.(z)* 3. Commodatum, or *loan for uſe;* when goods are bailed, without pay, to be *uſed* for a certain time by the bailee. 4. Pignori acceptum; when a thing is bailed by a debtor to his creditor in *pledge*, or as a ſecurity for the debt. 5. Locatum, or *hiring*, which is always for *a reward;* and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary uſe of *the thing;* or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or beſtowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being *carried* from place to place, either to a *public* carrier, or to a *private* perſon.

I. The

(z) Law, B. 2. ch. 18.

I. The moſt ancient caſe, that I can find in our books, on the doctrine of Depoſits (there were others, indeed, a few years earlier, which turned on points of pleading) was adjudged in the eighth of Edward II. and is abridged by *Fitzherbert.(a)* It may be called Bonion's caſe, from the name of the plaintiff, and was, in ſubſtance, this: An action of detinue was brought for *ſeals*, *plate*, and *jewels*, and the defendant pleaded, "that the plaintiff had bailed to him a cheſt *to be kept*, which cheſt was *locked*; that the bailor himſelf took away the key, *without informing the bailee of the contents*; that robbers came in the night, *broke open the defendant's chamber*, and carried off the cheſt into the fields, where they forced the lock, and took out the *contents*; that the defendant was robbed at the ſame time of his own goods." The plaintiff replied, "that the jewels were delivered, in a cheſt *not locked*, to be reſtored at the pleaſure of the bailor," and *on this*, it is ſaid, *iſſue was joined.*

Upon

(a) Mayn. Edw. II. 275. Fitzh. Abr. *tit.* Detinue, 59.

Upon this caſe lord *Holt* obſerves, "that he cannot ſee, why the bailee ſhould not be charged with goods *in* a cheſt as well as with goods *out of* a cheſt; for, ſays he, the bailee has as little power over them, as to any benefit, that he might have from them, and as great power to defend them, in one caſe as in the other.(*b*)" The very learned judge was diſſatisfied, we ſee, with Sir *Edward Coke*'s reaſon, "that, when the jewels were locked up in a cheſt, the bailee was not in fact truſted with them.(*c*) Now there was a diverſity of opinion, upon this very point, among the greateſt lawyers of *Rome*; for "it was a queſtion, whether, if a box ſealed up had been depoſited, the box only ſhould be demanded in an action, or the clothes which it contained, ſhould alſo be ſpecified; and Trebatius inſiſts, that the box only, not the particular contents of it, muſt be ſued for; unleſs the things were previouſly ſhown, and then depoſited: but Labeo aſſerts, that he who

(*b*) Lord Raym. 914.

(*c*) 4 Rep. 84.

who depoſits the box, depoſits the contents of it; and ought therefore to demand the clothes themſelves. What then, if the depoſitary *was ignorant of the contents?* it ſeems to make no great difference, ſince he took the charge upon himſelf; and I am of opinion, ſays *Ulpian*, that, although the box was ſealed up, yet an action may be brought for what it contained.(*d*)" This relates chiefly to the form of the libel; but, ſurely, caſes may be put, in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trinkets, ought *from their nature* to be kept with peculiar care under lock and key: it would, therefore be *groſs* negligence in a depoſitary to leave ſuch a depoſit in an open antichamber, and *ordinary* neglect at leaſt, to let them remain on his table, where they might poſſibly tempt his ſervants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps,

(*d*) D. 16. 3. 1. 41.

perhaps, therefore, it would be no more than *ſlight* neglect, to leave out of a drawer a box or caſket, which was neither known, nor could juſtly be ſuſpected, to contain diamonds; and Domat, who prefers the opinion of *Trebatius*, decides, "that in ſuch a caſe, the depoſitary would only be obliged to reſtore the caſket, as it was delivered, without being reſponſible for the contents of it." I confeſs, however, that anxiouſly as I wiſh on all occaſions to ſee authorities reſpected, and judgements holden ſacred, Bonion's caſe appears to me wholly incomprehenſible; for the defendant, inſtead of having been *groſsly* negligent (which alone could have expoſed him to an action), ſeems to have uſed at leaſt *ordinary* diligence; and, after all, the loſs was occaſioned by a *burglary*, for which no bailee can be reſponſible without a very ſpecial undertaking. The plea, therefore, in this caſe was good, and the replication, idle; nor could I ever help ſuſpecting a miſtake in the laſt words *alii quod non*; although *Richard de Winchedon*, or whoever was the

the compiler of the *table* to this Year-book, makes a diſtinction, that, "if jewels be bailed to me, and *I put them* into a caſket, and *thieves rob me of them in the night time*, I am anſwerable; not, if they be *delivered* to me in a cheſt *ſealed up*;" which could never have been law; for the next oldeſt caſe, in the book of *Aſſiſe*, contains the opinion of chief juſtice Thorpe, that "a general bailee *to keep* is not reſponſible, *if the goods be ſtolen*, without his *groſs* neglect; (e)" and it appears, indeed, from *Fitzherbert*, that the party was driven to this iſſue, "whether the goods were taken away by *robbers*."

By the *Moſaic* inſtitutions, "if a man delivered to his neighbour money or ſtuff *to keep* and it was *ſtolen* out his houſe, and the thief could not be found, the maſter of the houſe was to be brought before the judge, and to be diſcharged, if he could ſwear, that he had not *put*

(e) 29 Aſſ. 28. Bro. Abr. *tit.* Bailment, pl. 7.

put his hand unto his neighbour's goods,*(f)*" or, as the *Roman* author of the Lex Dei tranſlates it, *Nihil ſe nequiter geſſiſſe ;(g)* but a diſtinction ſeems to have been made between a ſtealing by *day* and a ſtealing by *night ;(h)* and "if cattle were bailed and ſtolen, (by *day* I preſume) the perſon, who had the care of them, was bound to make reſtitution to the owner ;*(i)*" for which the reaſon ſeems to be, that when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depoſitary, and is, conſequently, obliged to uſe a degree of diligence *adequate to the charge :* now ſheep can hardly be ſtolen in the *day-time* without ſome neglect of the ſhepherd ; and we find that, when Jacob, who was, for a long time at leaſt, a bailee of a different ſort, *as he had a reward*, loſt of any

(f) Exod. xxii. 7, 8.

(g) Lib. 10. De Depoſito. This book is printed in the ſame volume with the *Theodoſian* Code, Paris, 1586.

(h) Gen. xxxi. 39.

(i) Exod. xxii. 12.

any of the beaſts intruſted to his care, Laban made him anſwer for them whether ſtolen by day or ſtolen by night.*(k)*"

Notwithſtanding the high antiquity as well as the manifeſt good ſenſe of the rule, a contrary doctrine was advanced by Sir Edward Coke in his *Reports*, and afterwards deliberately inſerted in his *Commentary on* Littleton, the great reſult of all his experience and learning; namely, "that a depoſitary is reſponſible, if the goods be ſtolen from him, unleſs he accept them ſpecially *to keep as his own*," whence he adviſes all depoſitaries to make a ſpecial acceptance.*(l)* This opinion, ſo repugnant to natural reaſon and the laws of all other nations, he grounded partly on ſome other broken caſes in the Year-books, mere converſations on the bench or looſe arguments at the bar; and partly on Southcote's caſe, which he has reported, and which by no means warrants his deduction from

(k) Gen. xxxi. 39.

(l) 4 Rep. 83. b. 1 Inſt. 89. a. b.

from it. As I humbly conceive that case to be law, though the doctrine of the learned reporter cannot in all points be maintained. I shall offer a few remarks on the pleadings in the cause, and the judgment given on them.

Southcote declared in detinue, that he had delivered goods to Bennet, *to be by him* safely *kept;* the defendant confessed such delivery, but pleaded in bar, that a certain person stole them out of his possession; the plaintiff replied, protesting that he had not been robbed, that the person named in the plea was a servant of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. "The reason of the judgment, says lord *Coke*, was, because the plaintiff had delivered the goods to be safely kept, and the defendant had taken the charge of them upon himself, by accepting them on such a delivery." Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced

produced the frothy conceit, which has occaſioned ſo many reflections on the caſe itſelf; namely, "that to *keep* and to keep *ſafely* are one and the ſame thing;" a notion, which was denied to be law by the whole court in the time of chief juſtice *Holt*.(*m*)

It is far from my intent to ſpeak in derogation of the great commentator on *Littleton*: ſince it may truly be aſſerted of him, as *Quintilian* ſaid of Cicero, that *an admiration of his works is a ſure mark of ſome proficiency in the ſtudy of the law*; but it muſt be allowed, that his profuſe learning often ran wild, that he has injured many a good caſe by the vanity of thinking to improve them.

The pleader, who drew the replication in *Southcote*'s caſe, muſt have entertained an idea, that the *blame* was *greater*, if a *ſervant* of the depoſitary ſtole the goods, than if a mere *ſtranger* had purloined them; ſince the defendant

(*m*) Ld. Raym. 911. *margin*.

ant ought to have been more on his guard againſt a perſon who had ſo many opportunities of ſtealing; and it was his own fault, if he gave thoſe opportunities to a man, of whoſe honeſty he was not morally certain: the court we find, rejected this diſtinction, and alſo held the replication informal, but agreed that no advantage could be taken on a *general* demurrer of ſuch informality, and gave judgment on the ſubſtantial badneſs of the plea.(*n*) If the plaintiff, inſtead of replying, had demurred to the plea in bar, he might have inſiſted in argument, with reaſon and law on his ſide, "that, although a *general* bailee *to keep* be reſponſible for groſs neglect *only*, yet *Bennet* had, by a *ſpecial* acceptance, made himſelf anſwerable for ordinary neglect *at leaſt*; that it was *ordinary* neglect, to let the goods be *ſtolen* out of his poſſeſſion, and he had not averred, that they were ſtolen *without his default*; that he ought to have put them into a *ſafe* place, according to his undertaking, and have kept the key himſelf; that

(*n*) 1 Cro. 815.

that the *ſpecial* bailee was reduced to the claſs of a *conductor operis*, or a workman *for hire*; and that a tailor, to whom his employer has delivered lace for a ſuit of clothes, is bound, if the lace be *ſtolen*, to reſtore the value of it.(*o*)" This reaſoning would not have been juſt, if the bailee had pleaded, as in *Bonion's* caſe, that he had been *robbed by violence*, for no degree of *care* can in general prevent an open robber: *impetûs prædonum*, ſays Ulpian, *à nullo præſtantur*.

Mr. Juſtice Powell, ſpeaking of *Southcote's* caſe, which he denies to be law, admits, that, "if

(*o*) "Alia eſt *furti* ratio; id enim *non caſui*, ſed *levi culpæ*, fermè aſcribitur." *Gothfr.* Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where ſays the annotator, "Adverſus *latrones* parum prodeſt cuſtodia; adverſus *furem* prodeſſe poteſt, ſi quis advigilet." See alſo Poth. *Contrat de Louage*, n. 429. and *Contrat de Pret à uſage*, n. 53. So by Juſtice *Cottesmore*, "Si jeo grante byens a un home a garder a mon oeps, ſi les byens, per *ſon meſgarde* ſont *embles*, il ſera charge a moy de meſmes les byens, mez s'il ſoit *robbs* de meſmes les byens, il eſt excuſable per le ley." 10 Hen. VI. 21.

"if a man *does* undertake *ſpecially* to keep goods ſafely, that is a warranty, and will oblige the bailee to keep them ſafely againſt perils, where *he has a remedy over*, but *not* againſt thoſe where he has *no* remedy over.(*p*)" One is unwilling to ſuppoſe, that this learned judge had not read lord *Coke*'s report with attention; yet the caſe, which he puts, is preciſely that which he oppoſes, for Bennet *did* undertake "to keep the goods ſafely;" and, with ſubmiſſion, *the degree of care demanded*, not *the remedy over*, is the true meaſure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods againſt *robbers* without a moſt expreſs agreement.(*q*) This, I apprehend, is all that was meaned by St. German, when he ſays, "that, if a man *have nothing* for keeping the goods bailed, and promiſe, at the time of the delivery, to reſtore them *ſafe at his peril*, he is not reſponſible for *mere caſualties*;(*r*)" but the rule extracted from this

(*p*) Ld. Raym. 912.

(*q*) Sho. pl. 166.

(*r*) Doct. and Stud. dial. 2. chap. 38.

this paſſage, " that *a ſpecial* acceptance to keep *ſafely*, will not charge the bailee againſt the acts of the *wrongdoers*,(*s*)" to which purport Hobart alſo and Croke are cited, is too general, and muſt be confined to acts of *violence*.

I cannot leave this point, without remarking, that a *tenant at will*, whoſe intereſt, when he has rentfree, the *Romans* called Precarium, ſtands in a ſituation exactly parallel to that of a depoſitary; for, although the contract be for *his benefit*, and, in ſome inſtances, for his benefit *only*, yet he has an *intereſt* in the land till the will is determined, " and, our law adds, it is the folly of the leſſor, if he do not reſtrain him by a ſpecial condition :" thence it was adjudged, in the *Counteſs of Shrewſbury*'s caſe, " that an action will not lie againſt a tenant at will *generally*, if the houſe be burned through his neglect ;(*t*)" but, ſays juſtice *Powell*, " had the action been founded on a *ſpecial* undertaking, as that, in conſideration that the leſſor would let him live in the houſe, he would deliver

(*s*) Com. 135. Ld. Raym. 915.

(*t*) 5 Rep. 13, b.

deliver it up *in as good repair as it then was in*, ſuch an action would have been maintainable.(*u*)"

It being then eſtabliſhed, that a bailee of the *firſt* ſort is anſwerable only for a *fraud*, or for *groſs* neglect, which is conſidered as evidence of it, and not for ſuch *ordinary* inattentions as may be compatible with *good faith*, if the depoſitary be himſelf *a careleſs and inattentive* man; a queſtion may ariſe, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to reſtitution, if the depoſit be loſt through his neglect, either *ordinary* or *ſlight*; and it ſeems eaſy to ſupport the affirmative; ſince in this caſe the meaſure of diligence is *that, which the bailee uſes in his own affairs*. It muſt however be confeſſed, that the character of the individual depoſitary can hardly be an object of judicial diſcuſion: if he be *ſlightly* or even *ordinarily*, negligent in keeping the goods depoſited, the favourable

(*u*) Ld. Raym. 911.

favourable preſumtion is, that he is equally neglectful of his own property; but this preſumption, like all others, may be repelled, and, if it be proved, for inſtance, that, his houſe, being on fire, he ſaved his own goods, and, having time and power to ſave alſo thoſe depoſited, ſuffered them to be burned, he ſhall reſtore the worth of them to the owner. *(w)* If, indeed, he have time to ſave only one of two cheſts, and one be a depoſit, the other his own property, he may juſtly prefer his own; unleſs that contain things of ſmall comparative value, and the other be full of much more precious goods, as fine linen or ſilks; in which caſe he ought to ſave the more valuable cheſt, and has a right to claim indemnification from the depoſitor for the loſs of his own. Still farther; if he commit even a *groſs* neglect in regard to his own goods *as well as* thoſe bailed, by which *both* are loſt or damaged, *he cannot be ſaid to have violated good faith*, and the

(w) Poth. *Contrat de Dépôt*, n. 29. Stiernh. *de Jure Sæon.* l. 2. c. 5.

the bailor muſt impute to his own folly the confidence which he repoſed in ſo improvident and thoughtleſs a perſon.(x)

To this principle, that a depoſitary is anſwerable *only* for *groſs* negligence, there are ſome exceptions.

Firſt, as in *Southcote*'s caſe, where the bailee, by a *ſpecial* agreement, has engaged to anſwer for more: "Si quid nominatim convenit," ſays the *Roman* lawyer, "vel plus vel minus in ſingulis contractibus, hoc ſervabitur quod initiò convenit; legem enim contractui dedit;(y)" but the opinion of Celſus, that an agreement *to diſpenſe with deceit* is void, as being contrary to good morals and decency, has the aſſent both of *Ulpian* and our *Engliſh* courts.(z)

Secondly;

(x) Bract. 99. b. Juſtin. Inſt. l. 3. tit. 15.

(y) l. *Contractus* 23. D. *de reg. jur.*

(z) Doct. and Stud. dial. 2. chap. 38.

Secondly; when a man ſpontaneouſly and officiouſly propoſes to keep the goods of another, *he may prevent the owner from intruſting them with a perſon of more approved vigilance*; for which reaſon *he takes upon himſelf*, according to Julian, *the riſk of the depoſit, and becomes reſponſible at leaſt for ordinary neglect, but not for mere caſualties.*(a)

Where things are depoſited through neceſſity on any ſudden emergence, as a fire or a ſhipwreck, M. Le Brun inſiſts, "that the depoſitary muſt anſwer for *leſs than groſs* neglect, how careleſs ſoever he may be in his own affairs; ſince the preceding remark, that a *man, who repoſes confidence in an improvident perſon, muſt impute any loſs to his own folly*, is inapplicable to a caſe, where the depoſit was not optional: and *the law ceaſes with the reaſon of it (b);*" but that is not the only reaſon; and, though it is an additional misfortune, for a man

(a) D. 16. 3. 1. 35.

(b) *De la Preſtation des Fautes*, p. 77.

a man in extreme haſte and deep diſtreſs to light upon a ſtupid or inattentive depoſitary, yet I can hardly perſuade myſelf, that more than perfect *good faith* is demanded in this caſe, although, a violation of that faith be certainly more criminal than in other caſes, and was therefore puniſhed at *Rome* by a forfeiture of the double value of the goods depoſited.

In theſe circumſtances, however, a benevolent *offer* of keeping another's property for a time would not, I think, bring the caſe within *Julian's* rule before mentioned, ſo as to make the perſon offering anſwerable for *ſlight* or even *ordinary*, negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than *good faith* of a *negotiorum geſtor*, when "affectione coactus, ne bona mea diſtrahantur, negotiis ſe meis obtulerit."

Thirdly; when the bailee, improperly called a *depoſitary*, either *directly* demands and receives

ceives a reward for his *care*, or takes the charge of goods *in consequence* of some *lucrative* contract, he becomes answerable for *ordinary* neglect; since, in truth, he is in both cases a *conductor operis*, and *lets out* his mental labour at a just price: thus, when clothes are left with a man, who is paid for the use of his bath, or a trunk with an inn-keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners, if the goods be lost or damaged through their want of *ordinary* circumspection, as if they were to receive a stipulated recompense *for their attention and pains*; but of this more fully, when we come to the article of *hiring*.

Fourthly; when the *bailee alone* receives advantage from the deposit, as, if a thing be borrowed on a future event, and deposited with the intended borrower, until the event happens, because the owner, perhaps is likely to be absent at the time, such a depositary must answer even for *slight* negligence; and this bailment, indeed, is rather a *loan* than a deposit,

poſit, in whatever light it may be conſidered by the parties. Suppoſe, for example, that *Charles*, intending to appear at a maſked ball expected to be given on a future night, requeſts *George* to lend him a dreſs and jewels for that purpoſe, and that *George*, being obliged to go immediately into the country, deſires *Charles* to keep the dreſs till his return, and, if the ball be given in the mean time, to wear it; this ſeems to be a regular *loan*, although the original purpoſe of borrowing be future and contingent.

Since, therefore, the two laſt caſes are not, in ſtrict propriety, *depoſits*, the exceptions to the general rule are reduced to two only; and the ſecond of them, I conceive, will not be rejected by the *Engliſh* lawyer, although I recollect no deciſion or dictum exactly conformable to the opinion of *Julian*.

Clearly as the obligation to *reſtore* a depoſit flows from the nature and definition of this contract, yet, in the reign of Elizabeth, when it

it had been adjudged, conſiſtently with common ſenſe and common honeſty, "that an action on the caſe lay againſt a man, who had not performed his promiſe of delivering, or delivering over, things bailed to him," that judgment was *reverſed;* and, in the 6th year of James, judgment for the plaintiff was arreſted in a caſe exactly ſimilar :(*c*) it is no wonder that the profeſſion *grumbled,* as lord Holt ſays, at ſo abſurd a reverſal ; which was itſelf moſt juſtly reverſed a few years after, and the firſt deciſion ſolemnly eſtabliſhed.(*d*)

Among the curious remains of *Attic* law, which philologers have collected, very little relates to the contracts, which are the ſubject of this eſſay ; but I remember to have read of Demoſthenes, that he was advocate for a perſon, with whom *three* men had depoſited ſome valuable utenſil, of which they were joint owners ; and the depoſitary had delivered it to *one*

(*c*) Yelv. 4. 50. 128.

(*d*) 2 Cro. 667. *Wheatly* and *Law.*

one of them, of whose knavery he had no suspicion; upon which the other *two* brought an action, but were nonsuited on their own evidence, that there was a *third* bailor, whom they had not joined in the suit; for the truth not being proved, *Demosthenes* insisted, *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it;* and this doctrine was good at *Rome* as well as at *Athens*, when the thing deposited was in its nature incapable of partition: it is also law, I apprehend, in Westminster hall.(*e*)

The obligation to return a deposit faithfully was, in very early times, holden sacred by the *Greeks*, as we learn from the story of Glaucus, who, on consulting the oracle, received this answer, "that it was criminal even *to harbour a thought* of with-holding deposited goods from the owners, who claimed them;(*f*)" and a fine application of this *universal* law is made by

(*e*) D. 16. 3. 1. 36. Bro. Abr. *tit.* Bailment, pl. 4.

(*f*) Herod. VI. 86. Juv. *Sat.* XIII. 199.

by an *Arabian* poet contemporary with Juſtinian, who remarks, "that life and wealth are only *depoſited* with us by our Creator, and, *like all other depoſits*, muſt in due time be reſtored."

II. Employment by commiſſion was alſo known to our ancient lawyers; and Bracton, the beſt writer of them all, expreſſes it by the Roman word, *Mandatum*, now, as the very eſſence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commiſſion* is alſo pretty generally applied to the bailees, who receive *hire* or *compenſation* for their attention and trouble, I ſhall not ſcruple to adopt the word Mandate as appropriated *in a limited ſenſe* to the ſpecies of bailment now before us; nor will any confuſion ariſe from the common acceptation of the word in the ſenſe of a judicial command or precept, which is in truth only a *ſecondary* and inaccurate uſage of it. The great diſtinction then between one ſort of *mandate* and a *depoſit* is, that the former *lies in feſance*, and the latter, ſimply *in cuſtody*:

whence, as we have already intimated, a difference often ariſes between the degrees of care demanded in the one contract and in the other; for, the mandatary being conſidered as having engaged himſelf, to uſe *a degree of diligence and attention adequate to the performance of his undertaking*, the omiſſion of ſuch diligence may be, according to the nature of the buſineſs, either *ordinary*, or *ſlight*, neglect; although a bailee of this ſpecies ought regularly to be anſwerable only for a violation of *good faith*. This is the common doctrine taken from the law of Ulpian; but there ſeems, in reality, to be no exception in the preſent caſe from the general rule; for, ſince *good faith* itſelf obliges every man *to perform his actual engagements*, it of courſe obliges the mandatary to exert himſelf in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute ſoever, by which his employer may ſuſtain damage, nor *omit* any thing, however inconſiderable, which the nature of the act requires :(*g*) nor will a want of ability to perform

(*g*) Lord Raym, 910.

form the contract be any defence for the contracting party; for, though the law *exacts no impoſſible things*, yet it may juſtly require, that every man ſhall know his own ſtrength, before he undertakes to do an act, and that, if he delude another by falſe pretenſions to ſkill, he ſhall be reſponſible for any injury that may be occaſioned by ſuch deluſion. If, indeed, an unſkilful man yield to the preſſing inſtances of his friend, who could not otherwiſe have his work performed, and engage reluctantly in the buſineſs, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almoſt needleſs to add, that a mandatary, as well as a depoſitary, may bind himſelf by a *ſpecial* agreement to be anſwerable even for caſualties: but that neither the one nor the other can exempt himſelf by any ſtipulation from reſponſibility for *fraud* or, its equivalent *groſs* neglect.

A diſtinction ſeems very early to have been made in our law between the *non* feſance, and the *mis* feſance, of a *conductor operis*, and, by equal reaſon, of a mandatary, or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the caſe was brought againſt a carpenter, who, having undertaken to build a new houſe for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonſuit; but agreed, that, if the defendant had built the houſe negligently and ſpoiled the timber, an action againſt him would have been maintainable.(*h*) However, in a ſubſequent reign, when a ſimilar action was commenced againſt one Watkins for *not building* a mill according to his undertaking, there was a long converſation between the judges and the bar, which cheif juſtice *Babington* at length interrupted by ordering the defendant's counſel either to plead or to demur, but ſerjeant *Rolf* choſe to plead

(*h*) Yearb. 11 Hen. IV. 33.

plead ſpecially, and iſſue was taken on a *diſcharge* of the agreement.(*i*) Juſtice *Martin* objected to the action, becauſe no tort was alledged; and he perſiſted warmly in his opinion, which ſeems not wholly irreconcilable to that of his two brethren; for, in the caſes, which they put, a ſpecial injury *was* ſuppoſed to be occaſioned by the nonperformance of the contract.

Authority and reaſon both convince me, that *Martin*, into whoſe opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as juſtice *Cokain* and the chief juſtice ſeem to have underſtood him, that no ſuch action would lie for *non* feſance, even *though ſpecial damage had been ſtated.* His argument was that the action before them *founded in covenant* merely, and required a ſpecialty to ſupport it; but that, if the covenant had been

(*i*) Yearb, 3. Hen. VI. 36. b. 37. a. *Stath.* Abr. tit. *Accions ſur le cas*, pl. 20.

been changed into a *tort*, a good writ of treſſpaſs on the caſe might have been maintained: he gave, indeed, an example of *mis* feſance, but did not controvert the inſtances, which were given by the other judges.

It was not alledged in either of the caſes juſt cited, that the defendant was to receive *pay* for the feſance of his work; but, ſince both defendants were deſcribed as *actually in trade*, it was not perhaps intended, that they were to work *for nothing*: I cannot however perſuade myſelf, that there would have been any difference, had the promiſes been purely *gratuitous*, and had a ſpecial injury been cauſed by the breach of them. Suppoſe, for inſtance, that *Robert*'s corn-fields are ſurrounded by a ditch or trench, in which the water from a certain ſpring uſed to have a free courſe, but which has of late been obſtructed by ſoil and rubbiſh; and that, *Robert* informing his neighbour *Henry* of his intention ſpeedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obſtruction

obſtruction and repair the banks *without reward*, he having buſineſs of the ſame kind to perform on his own grounds: if, in this caſe, *Henry* neglected to do the work undertaken, "and the water, not having its natural courſe, overflow the fields of *Robert*, and ſpoil his corn," may not *Robert* maintain his action on the caſe? Moſt aſſuredly; and ſo in a thouſand inſtances of proper bailments that might be ſuppoſed; where a juſt reliance on the promiſe of the defendant prevented the plaintiff from employing another perſon, and was, conſequently, the cauſe of the loſs, which he ſuſtained; (*k*) for it is, as it ought to be, a general rule, that, for every *damnum injuriâ datum*, an action of ſome ſort, which it is the province of the pleader to adviſe, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the juſt maxim of *Paulus*, *Adjuvari nos, non decipi, beneficio oportet*: (*l*) but the *ſpecial* damage, not the aſſumption,

(*k*) Yearb. 19 Hen. VI. 49.

(*l*) D. 13. 6. 17. 3.

aſſumption, is the cauſe of *this* action ; and, if *notice* be given by the mandatary, *before any damage incurred, and while another perſon may be employed,* that he cannot perform the work, no proceſs of law can enforce the performance of it.

A caſe in *Brook,* made complete from the Year-book, to which he refers, *ſeems* directly in point ; for, by chief juſtice Fineux, *it had been adjudged,* that, " if a man, aſſume to build a houſe for me by a certain day, and do not build it, *and I ſuffer damage by his non feſance,* I ſhall have an action on the caſe, as well as if he had *done it amiſs :*" but it is *poſſible,* that *Fineux* might ſuppoſe a conſideration, though none be mentioned.(*m*)

Actions on this contract are, indeed, very uncommon, for a reaſon not extremely flattering to human nature ; becauſe it is very uncommon to undertake any office of trouble *without*

(*m*) Bro. Abr. *tit.* Action ſur le Caſe, 72.

without compenſation; but, whether the caſe really happened, or the reward, which had actually been ſtipulated was omitted in the declaration, the queſtion "whether a man was reſponſible for damage to certain goods, occaſioned by his negligence in performing a Gratuitous promiſe," came before the court, in which lord *Holt* preſided, ſo lately as the ſecond year of queen Anne; and a point, which the firſt elements of the *Roman* law have ſo fully decided, that no court of judicature on the continent would ſuffer it to be debated, was thought in England *to deſerve*, what it certainly received, *very great conſideration*.(*n*)

The caſe was this: Bernard had aſſumed *without pay* ſafely to remove ſeveral caſks of brandy from one cellar, and lay them down *ſafely* in another, but managed them ſo negligently, that one of the caſks was ſtaved. After the general iſſue joined, and a verdict for the plaintiff Coggs, a motion

(*n*) Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

a motion was made in arreſt of judgment on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompenſe for his pains*, nor that he was a *common porter*: but the court were unanimouſly of opinion, that the action lay; and, as it was thought a matter of great conſequence, each of the judges delivered his opinion ſeparately.

The chief juſtice, as it has before been intimated,(*o*) pronounced a clear, methodical, elaborate argument; in which he diſtinguiſhed bailments into *ſix* ſorts, and gave a hiſtory of the principal authorities concerning each of them. This argument is juſtly repreſented by my learned friend, the annotator *on the firſt Inſtitute*, as "a moſt maſterly view of the whole ſubject of bailment;(*p*)" and, if my little work be conſidered merely as a commentary on it, the ſtudent may perhaps think, that my time

(*o*) P. 27.

(*p*) Hargr. Co. Litt. 89. b. n. 3. The profeſſion muſt lament the neceſſary ſuſpenſion of this valuable work.

time and attention have not been unuſefully beſtowed.

For the deciſion of the principal caſe, it would have been ſufficient, I imagine, to inſiſt, that the point was *not new*, but had already been determined; that the writ in the Regiſter, called, in the ſtrange dialect of our forefathers, *De pipâ vini cariandâ*,(*q*) was not ſimilar, but identical; for, had the reward been the *eſſence* of the action, it muſt have been inſerted in the writ, and nothing would have been left for the declaration but the ſtating of the day, the year, and other circumſtances; of which *Raſtell* exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickſet hedge*, which the defendant had promiſed to raiſe, *without any conſideration alledged*; and iſſue was joined on a traverſe of the negligence and improvidence.(*r*) How any anſwer could have been given

(*q*) Reg. Orig. 110. a. ſee alſo 110. b. *De equo infirmo ſanando*, and *De columbari reparando*.

(*r*) Raſt. Entr. 13. b.

given to theſe authorities, I am at a loſs even to conceive: but, although it is needleſs to prove the ſame thing twice, yet other authorities, equally unanſwerable, were adduced by the court, and ſupported with reaſons no leſs cogent; for, *nothing*, ſaid Mr. Juſtice *Powell*, emphatically, *is law that is not reaſon*; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abſtract, are falſe in concrete; for, ſince the reaſon of *Titius* may, and frequently does, differ from the reaſon of *Septimius*, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many inſtances know what to adviſe, unleſs courts were bound by *authority*, as firmly as the pagan deities were ſuppoſed to be bound by the decrees of fate.

Now the *reaſon* aſſigned by the learned judge for the caſes in the *Regiſter* and *Year-books*, which were the ſame with *Coggs* and *Bernard*, namely, "that the party's ſpecial *aſſumpſit* and undertaking

undertaking obliged him *ſo* to do the thing, that the bailor came to no damage by his neglect," ſeems to intimate, that the omiſſion of the words *ſalvò et ſecurè*, would have made a difference in this caſe, as in that of a *depoſit*: but, I humbly contend, that thoſe words are implied, by the nature of a contract which lies *in feſance*, agreeably to the diſtinction with which I began this article. As judgment, indeed, was to be given on the record merely, it was unneceſſary, and might have been improper, to have extended the propoſition beyond the point then before the court; but I cannot think, that the narrowneſs of the propoſition in this inſtance affects the general doctrine, which I have preſumed to lay down; and, in the ſtrong caſe of the ſhepherd, *who had a flock to keep*, which he *ſuffered through negligence to be drowned*, neither a *reward* nor a *ſpecial* undertaking are ſtated :(*s*) that caſe, in the opinion of juſtice *Townſend*, depended upon the diſtinction between a bargain *executed* and *executory*;

(*s*) Yearb. 2 Hen. VII. 11.

executory but I cannot doubt the relevancy of an action in the ſecond caſe, as well as firſt, *whenever actual damage is occaſioned by the non-feſance.*(t)

There ſeems little neceſſity after this, to mention the caſe of *Powtuary* and *Walton*, the *reaſon* of which applies directly to the preſent ſubject; and, though it may be objected that the defendant was a ſtated *farrier*, and muſt be preſumed to have acted in his trade, yet chief juſtice *Rolle* intimates no ſuch preſumption; but ſays expreſsly, that "an action on the caſe lies upon this matter, *without alledging any conſideration*; for the *negligence* is the cauſe of action, and not the *aſſumpſit.*(u)"

A

(t) *Stath. Abr.* tit. *Accions ſur le cas*, pl. 11. By juſtice *Paſtan*, "ſi un ſerrour face covenant ove moy de ferrer mon chival, jeo die qe ſil *ne ferra* chival. uncore jeo averai acci n ſur mon cas, qar en ſon default peraventure mon chival eſt perie."

(u) 1 Ro. Abr. 10.

A bailment without reward to carry from place to place is very different from a mandate to perform a work; and, there be nothing to take it out of the general rule, I cannot conceive that the bailee is reſponſible for *leſs* than *groſs* neglect, unleſs there be a *ſpecial* acceptance; for inſtance, if *Stephen* deſire *Philip* to carry a diamond-ring from *Briſtol* to a perſon in *London*, and he put it *with bank notes of his own* into a letter-caſe, out of which it is *ſtolen* at an inn, or ſeized by a robber on the road, *Philip* ſhall not be anſwerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purſe at the inn, and have concealed it ſomewhere in the carriage; but, if he were to ſecrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaiſe, I think he would be bound, in caſe of a loſs by ſtealth or robbery, to reſtore the value of it to *Stephen*: every thing, therefore, that has been expounded in the preceding article concerning depoſits, may be applied exactly to this

this ſort of bailment, which may be conſidered as a ſubdiviſion of the ſecond ſpecies.

Since we have nothing in theſe caſes analogous to the judgments of infamy, which were often pronounced at *Rome* and *Athens*, it is hardly neceſſary to add, what appears from the ſpeech of Cicero for S. *Roſcius* of *Ameria*, that "the ancient *Romans* conſidered a mandatary as infamous, if he broke his engagement, not only by actual fraud, but even by more than ordinary negligence.(*w*)

As to exceptions from the rule concerning the degree of neglect, for which a mandatary is reſponſible, almoſt all, that has been advanced before in the article of depoſits, in regard to a ſpecial convention, a voluntary offer, and

(*w*) "In privatis rebus, ſi quis rem *mandatam* non modo *malitioſiùs* geſſiſſet ſui quæſtûs aut commodi causâ, verùm etiam *negligentiùs*, eum majores ſummum admiſiſſe dedecus exiſtimabant: itaque *mandati* conſtitutum eſt judicium, non minùs turpe quàm *furti*." Pro S. Roſc. p. 116. *Claſg.*

and an intereſt accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an abſent perſon, and without his knowledge, is the *negotiorum geſtor* of the civilians, and the obligation reſulting from his implied contract has been incidentally mentioned in a preceding page.

III. On the third ſpecies of bailment, which is one of the moſt uſual and moſt convenient in civil ſociety, little remains to be obſerved; becauſe our own, and the Roman, law are on this head perfectly coincident. I call it, after the *French* lawyers, loan for uſe, to diſtinguiſh it from their loan for conſumption, or the mutuum of the *Romans*; by which is underſtood the lending of money, wine, corn, and other things, that may be valued by number, weight, or meaſure, and are to be reſtored only in equal value or quantity: (*x*) this

(*x*) Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this paſſage from *Bracton* is cited by

this latter contract, which, according to St. German, is moſt properly called a loan, does not belong to the preſent ſubject; but it may be right to remark, that, as the ſpecific things are not to be returned, the abſolute property of them is transferred to the borrower, who muſt bear the loſs of them, if they be deſtroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in queſtion; for a horſe, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the uſe of the bailee, ought to be delivered ſpecifically; and the owner muſt abide the loſs, if they periſh through any accident, which a very careful and vigilant man

by the chief juſtice, *mutuam* is printed for *commodatam*; but what then can be made for the words *ad* ipſam *reſtituendam?* There is certainly ſome miſtake in the paſſage, which muſt be very ancient, for the oldeſt MS. that I have ſeen is conformable to *Tottle's* edition. I ſuſpect the omiſſion of a whole line after the word *precium*, where the manuſcipt has a full point; and poſſibly the ſentence omitted may be thus ſupplied from *Juſtinian*, whom *Bracton* copied: "At is qui *mutuum* accepit, obligatus remanet," ſi forte incendio, &c. *Inſt.* 13. 2.

man could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is conſtrued rigorouſly, and, although *ſlight*, makes him liable to indemnify the lender; nor will his incapacity to exert more than ordinary attention avail him on the ground of an *impoſſibility*, "which the law, ſays the rule, never demands;" for that maxim relates merely to things abſolutely impoſſible; and it was not only very poſſible, but very expedient, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the quality, as well as age, of the borrower, he muſt be ſuppoſed to have demanded no higher care, than that of which ſuch a perſon was capable; as, if *Paul* lend a fine horſe to a raw youth, he cannot exact the ſame degree of management and circumſpection, which he would expect from a riding-maſter or an officer of dragoons.(y)

From

(y) *Dumoulin*, tract *De eo quod intereſt*, n. 185.

From the rule, that a borrower is anſwerable for *ſlight* neglect, compared with the diſtinction before made between ſimple *theft* and *robbery*,(z) it follows, that, if the borrowed goods be ſtolen out of his poſſeſſion by any perſon whatever, he muſt pay the worth of them to the lender, unleſs he prove, that they were purloined notwithſtanding his extraordinary care. The example, given by *Julian*, is the firſt and beſt that occurs: *Caius* borrows a ſilver ewer of *Titius*, and afterwards delivers it, that it may be ſafely reſtored, to a bearer of ſuch approved fidelity and warineſs, that no event could be leſs expected than its being ſtolen; if, after all, the bearer be met in the way by ſcoundrels, who contrive to ſteal it, *Caius* appears to be wholly blameleſs, and *Titius* has ſuffered *damnum ſine injuriâ*. It ſeems hardly neceſſary to add, that the ſame care, which the bailee is bound to take of the principal thing bailed, muſt be extended to ſuch acceſſory things, as belong to it, and were delivered

(z) See p. 61, and note (o)

livered with it: thus a man, who borrows a watch, is reſponſible for ſlight neglect of the chain and ſeals.

Although the laws of *Rome*, with which thoſe of *England* in this reſpect agree, moſt expreſsly decide, that a borrower, uſing more than ordinary diligence, ſhall not be chargeable, if there be a force which he cannot reſiſt,(*a*) yet *Pufendorf* employs much idle reaſoning, which I am not idle enough to tranſcribe, in ſupport of a new opinion; namely, "that the borrower ought to indemnify the lender, if the goods lent be deſtroyed by fire, ſhipwreck, or other inevitable accident, and without his fault, unleſs his own periſh with them: for example, if *Paul* lend *William* a horſe worth thirty guineas to ride from *Oxford* to *London*, and *William* be attacked on a heath in that road by highwaymen, who kill or ſeize the horſe, he is obliged, according to *Pufendorf* and his annotator, to pay thirty guineas to *Paul*.

(*a*) D. 44. 7. 1. 4. Ld. Raym. 916.

Paul. The juſtice and good ſenſe of the contrary deciſion are evinced beyond a doubt by M. Pothier, who makes a diſtinction between thoſe caſes, where the loan was the occaſion merely of damage to the lender, who might in the mean time have ſuſtained a loſs from other accidents, and thoſe, where the loan was the ſole efficient cauſe of his damage:(*b*) as if *Paul*, having lent his horſe, ſhould be forced in the interval by ſome preſſing buſineſs to hire another for himſelf; in this caſe the borrower ought, indeed, to pay for the hired horſe, unleſs the lender had voluntarily ſubmitted to bear the inconvenience cauſed by the loan; for, in this ſenſe and in this inſtance, a benefit conferred ſhould not be injurious to the benefactor. As to a condition preſumed to be impoſed by the lender, that he would not abide by any loſs occaſioned by the lending, it ſeems the wildeſt and moſt unreaſonable of preſumptions: if *Paul* really intended to impoſe ſuch a condition,

(*b*) Poth. *Prêt à Uſage*, 55. *Puff.* with *Barbeyrac's* notes, B. 5. C. 4. § 6.

condition, he ſhould have declared his mind; and I perſuade myſelf, that *William* would have declined a favour ſo hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and paſs through ſome thicket, where robbers might be ſuppoſed to lurk, or had he travelled in the dark at a very unſeaſonable hour, and had the horſe, in either caſe, been taken from him or killed, he muſt have indemnified the owner; for irreſiſtible force is no excuſe, if a man put himſelf in the way of it by his own raſhneſs. This is nearly the caſe, cited by St. *German* from the *Summa Roſella*, where a loan muſt be meaned, though the word *depoſitum* be erroneouſly uſed;(*c*) and it is there decided, that, if the borrower of a horſe will imprudently ride by a ruinous houſe in manifeſt danger of falling, and part of it actually fall on the horſe's head, and kill him, the lender is entitled to the price of him; but that, if the houſe were in good

(*c*) *Doct.* and *Stud.* where before cited.

good condition, and fell by the violence of a ſudden hurricane, the bailee ſhall be diſcharged. For the ſame, or a ſtronger reaſon, if *William*, inſtead of coming to *London*, for which purpoſe the horſe was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes reſponſible for any accident, that may befal the horſe in his journey to *Bath*, or after the expiration of the week.(*d*)

Thus, if *Charles*, in a caſe before put,(*e*) wear the maſked habit and jewels of *George* at the ball, for which they were borrowed, and be robbed of them in his return home at the uſual time and by the uſual way, he cannot be compelled to pay *George* the value of them, but it would be otherwiſe, if he were to go with the jewels from the theatre to a gaming-houſe, and were there to loſe them by any caſualty whatever. So, in the inſtance propoſed by *Gaius* in the digeſt, if ſilver utenſils be lent to a man for the purpoſe of entertaining a party of friends

(*d*) Ld. Raym. 915. (*e*) P. 69.

friends at ſupper in the metropolis, and he carry them into the country, there can be no doubt of his obligation to indemnify the lender, if the plate be loſt by accident however irreſiſtible.

There are other caſes, in which a borrower is chargeable for inevitable miſchance, even when he has not taken the whole riſk upon himſelf as he legally may, by expreſs agreement. For example, if the houſe of *Caius* be in flames, and he, being able to ſecure one thing only, ſave an urn of his own in preference to the ſilver ewer, which he had borrow-of *Titius*, he ſhall make the lender a compenſation for the loſs; eſpecially if the ewer be the more valuable, and would conſequently have been preferred, had he been owner of them both: even if his urn be more precious, he muſt either leave it, and bring away the borrowed veſſel, or pay *Titius* the value of that which he has loſt; unleſs the alarm was ſo ſudden, and the fire ſo violent, that no deliberation or ſelection could be juſtly expected, and

Caius had time only to ſnatch up the firſt utenſil that preſented itſelf.

Since openneſs and honeſty are the ſoul of contracts, and ſince "a ſuppreſſion of truth is often as culpable as an expreſs falſehood," I accede to the opinion of M. *Pothier*, that, if a ſoldier were to borrow a horſe of his friend for a battle expected to be fought the next morning, and were *to conceal from him, that his own horſe was as fit for the ſervice*, and if the horſe, ſo borrowed, were ſlain in the engagement, the lender ought to be indemnified; for probably the diſſimulation of the borrower induced him to lend the horſe; but, had the ſoldier openly and frankly acknowledged, that he was unwilling to expoſe his own horſe, ſince, in caſe of a loſs, he was unable to purchaſe another, and his friend, nevertheleſs, had generouſly lent him one, the lender would have run, as in other inſtances, the riſk of the day.

If the bailee, to uſe the *Roman* expreſſion, be *in morâ*, that is, if a legal demand have been made

made by the bailor, he muſt anſwer for any caſualty that happens after the demand; unleſs in caſes, where it may be ſtrongly preſumed, that the ſame accident would have befallen the thing bailed, even if it had been reſtored at the proper time; or, unleſs the bailee have legally tendered the thing, and the bailor have put himſelf *in morâ* by refuſing to accept it: this rule extends of courſe to every ſpecies of bailment.

"Whether in the caſe of a valued loan, or, where the goods lent are eſtimated at a certain price, the borrower muſt be conſidered as bound in all events, to reſtore either the things lent or the value of them," is a queſtion, upon which the civilians are as much divided, as they are upon the celebrated clauſe in the law *Contractus*; five or ſix commentators of high reputation enter the liſts againſt as many of equal fame, and each ſide diſplays great ingenuity, and addreſs in this juridicial tournament. *D'Avezan* ſupports the affirmative; and *Pothier*, the negative; but the ſecond opinion

ſeems

ſeems the more reaſonable. The word *periculum*, uſed by *Ulpian*, is in itſelf equivocal: it means hazard in general, proceeding either from accident or from neglect; and in this latter ſenſe it appears to have been taken by the *Roman* lawyer in the paſſage, which gave birth to the diſpute. But, whatever be the true interpretation of that paſſage, I cannot ſatisfy myſelf, that, either in the Cuſtomary Provinces of *France*, or in *England*, a borrower can be chargeable for all events without his conſent unequivocally given: if *William*, indeed, had ſaid to *Paul* alternatively, "I promiſe, on my return to *Oxford*, either to reſtore your horſe or to pay you thirty guineas," he muſt in all events have performed one part of this diſjunctive obligation; (*f*) but, if *Paul* had only ſaid, "the horſe, which I lend you for this journey, is fairly worth thirty guineas," no more could be implied from thoſe words, than a deſign of preventing any future difficulty about the price, if the horſe ſhould be killed or injured through an omiſſion of that extraordinary

(*f*) Palm. 551.

ordinary diligence, which the nature of the contract required.

Beſides the general exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus, vel minus*, another is, where goods are lent for a uſe, in which the lender has a common intereſt with the borrower: in this caſe, as in other bailments reciprocally advantageous, the bailee can be reſponſible for no more than ordinary negligence; as, if *Stephen* and *Philip* invite ſome common friends to an entertainment prepared at their joint expenſe, for which purpoſe *Philip* lends a ſervice of plate to his companion, who undertakes the whole management of the feaſt, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it muſt be decided, that, if goods be lent for the *ſole* advantage of the *lender*, the borrower is anſwerable

for *groſs* neglect only; as, if a paſſionate lover of muſic were to lend his own inſtrument to a player in a concert, merely to augment his pleaſure from the performance; but here again, the bailment is not ſo much a *loan*, as a *mandate*; and, if the muſician were to play with all due ſkill and exertion, but were to break or hurt the inſtrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the inſtrument, and had no particular deſire to uſe it. If, indeed, a poor artiſt, having loſt or ſpoiled his violin or flute, be much diſtreſſed by this loſs, and a brother-muſician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with *Deſpeiſſes*, a learned advocate of *Montpellier* and writer on *Roman* law, that the player may be leſs careful of it than any other borrower: on the contrary, he is bound, in conſcience at leaſt, to raiſe his attention even to a higher degree; and his negligence ought to be conſtrued with rigour.

By

By the law of Moſes, as it is commonly tranſlated, a remarkable diſtinction was made between the loſs of borrowed cattle or goods, happening in the *abſence* or the *preſence*, of the owner; for, ſays the divine legiſlator, "if a a man borrow aught of his neighbour, and it be hurt or die, *the owner thereof not being with it*, he ſhall ſurely make it good; but, if the *owner* thereof *be* with it, he ſhall *not* make it good :(*g*)" now it is by no means *certain*, that the original words ſignifies the *owner*, for it *may* ſignify, the *poſſeſſor*, and the law *may* import, that the borrower ought not to loſe ſight, when he can poſſibly avoid it, of the thing borrowed; but, if it was intended, that the borrower ſhould always anſwer for caſualties, *except in the caſe*, which muſt rarely happen, of *the owner's preſence*, this exception ſeems to prove, that no caſualties were meaned, but ſuch as *extraordinary* care might have prevented; for I cannot ſee, what difference could be made by the preſence of the owner, if the force,

(*g*) Exod. xxii. 14, 15.

force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old *Athenian* law is preserved by *Demosthenes*, from which little can be gathered on account of its generality and the use of an ambiguous word:(*h*) it is understood by *Petit* as relating to guardians, mandataries, and commissioners; and it is cited by the orator in the case of a guardianship. The *Athenians* were, probably, satisfied with speaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or severely, according to the circumstances of each particular case.

IV. As to the degree of diligence, which the law requires from a *pawnee*, I find myself again obliged to dissent from Sir *Edward Coke*, with whose opinion a similar liberty has before

(*h*) Περὶ ὧν καθυφῆκέ τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. *Reiske*'s edition. 855. 3. Here the verb καθυφιεναι may imply *slight*, or *ordinary*, neglect; or even *fraud*, as *Petit* has rendered it.

fore been taken in regard to a *depoſitary*; for that very learned man lays it down, that, "if goods be delivered to one as a *gage* or *pledge*, and they be *ſtolen*, he ſhall be diſcharged, becauſe *he hath a property* in them; and, *therefore*, he ought to keep them *no otherwiſe than his own* :(*i*)" I deny the firſt propoſition, the reaſon, and the concluſion.

Since the bailment, which is the ſubject of the preſent article, is beneficial to the *pawnee* by ſecuring the payment of his debt, *and* to the *pawnor* by procuring him credit, the rule, which natural reaſon preſcribes, and which the wiſdom of nations has confirmed, makes it requiſite for the perſon, to whom a gage or pledge is bailed, to take *ordinary* care of it; and he muſt conſequently be reſponſible for *ordinary* neglect.(*k*) This is expreſsly holden by Bracton; and, when I rely on his authority, I am perfectly aware, that he copied *Juſtinian* almoſt word for word, and that lord *Holt*, who makes

(*i*) 1 Inſt. 89. a 4 Rep. 83. b.

(*k*) Bract. 99. b.

makes conſiderable uſe of his treatiſe, obſerves three or four times, "that he was an *old* author ;(*l*)" but, although he had been a civilian, yet he was alſo a great common-lawyer, and never, I believe, adopted the rules and expreſſions of the *Romans*, except when they coincided with the laws of *England* in his time: he is certainly the *beſt* of our juridical claſſics and, as to our *ancient* authors, if their doctrine be *not law*, it muſt be left to mere hiſtorians and antiquaries; but, if it remain unimpeached by any later deciſion, it is not only equally binding with the moſt recent law, but has the advantage of being matured and approved by the collected ſagacity and experience of ages. The doctrine in queſtion has the full aſſent of lord *Holt* himſelf; who declares it to be "*ſufficient*, if the pawnee uſe *true*, and *ordinary* diligence for reſtoring the goods, and that, ſo doing, he will be indemnified, and, notwithſtanding the loſs, ſhall reſort to the pawnor for his debt." Now it has been proved, that "a bailee

(*l*) Ld. Raym. 915. 916. 919.

"a bailee cannot be conſidered as uſing *ordinary* diligence, who ſuffers the goods bailed to be taken by *ſtealth* out of his cuſtody ;(*m*)" and it follows, that, "a pawnee ſhall *not* be diſcharged, if the pawn be ſimply *ſtolen* from him ;" but if he be forcibly *robbed* of it *without his fault*, his debt ſhall not be extinguiſhed.

The paſſage in the *Roman* inſtitutes, which *Bracton* has nearly tranſcribed, by no means convinces M. Le Brun, that a *pawnee* and a *borrower* are not reſponſible for *one and the ſame* degree of negligence ; and it is very certain, that, *Ulpian*, ſpeaking of the *Actio pignoratitia*, uſes theſe remarkable words : "Venit in *hac* actione et *dolus* et *culpa* ut in *commodato*, venit et cuſtodia ; vis major non venit." To ſolve this difficulty, *Noodt* has recourſe to a conjectural emendation, and ſuppoſes ut to have been inadvertently written for at ; but, if this was a miſtake, it muſt have been pretty ancient :

(*m*) P. 61. and note (*o*)

cient for the *Greek* tranſlators of this ſentence uſe a particle of ſimilitude, not an adverſative: there ſeems, however, no occaſion for ſo hazardous a mode of criticiſm. *Ulpian* has not ſaid, "*talis* culpa *qualis* in commodato;" nor does the word ut imply an *exact* reſemblance: he meaned that a pawnee was anſwerable for *neglect*, and gave the firſt inſtance, that occurred, of another contract, in which the party was likewiſe anſwerable for *neglect*, but left the *ſort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himſelf expreſsly mentions pignus among other contracts *reciprocally uſeful*, and diſtinguiſhes it from commodatum, whence the borrower *ſolely* derives advantage.(n)

It is rather leſs eaſy to anſwer the caſe in the book of *Aſſiſe*, which ſeems wholly ſubverſive of my reaſoning, and, if it ſtand unexplained, will break the harmony of my ſyſtem;

(n) Before, p. 16.

tem ;(o) for there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him *in gage* for a certain ſum of money ; that he had put it among his other goods ; and that all together had been *ſtolen* from him :" now, according to my doctrine, the plaintiff might have demurred to the plea ; but he was *driven* to reply, "that he *tendered* the money before the *ſtealing*, and that the creditor refuſed to accept it," on which fact iſſue was joined ; and the reaſon, aſſigned by the chief juſtice, was, that, "if a man bail goods to me *to keep*, and I put them among my own, I ſhall not be charged, if they be *ſtolen*." To this caſe I anſwer : firſt, that, if the court really made no difference between a *pawnee* and a *depoſitary*, they were indubitably miſtaken ; for which aſſertion I have the authority of *Bracton*, lord *Holt*, and St. *German*, who ranks the taker of a *pledge* in the

(o) 29 Aſſ. pl. 28.

the ſame claſs with a *hirer* of goods ;(*p*) next, that in a much later caſe, in the reign of Hen. VI. where a *hiring of cuſtody* ſeems to be meaned, the diſtinction between a *theft* and a *robbery* is taken agreeably to the *Roman* law ;(*q*) and, laſtly, that, although in the ſtrict propriety of our *Engliſh* language, to *ſteal* is to take *clandeſtinely*, and to *rob* is to ſeize by *violence*, correſponding with the *Norman* verbs *embleer* and *robber*, yet thoſe words are ſometimes uſed inaccurately ; and I always ſuſpected, that the caſe in the book of *Aſſiſe* related to a *robbery*, or a taking *with force ;* a ſuſpicion confirmed beyond any doubt by the judicious *Brook*, who *abridges* this very caſe with the following title in the margin, " Que ſerra al perde, quant les biens ſont *robbes* ;(*r*)" and, in a modern work, where the old caſes are referred to, it appears to have been ſettled, in conformity to them and to reaſon, " that if the pawn be laid up, and the pawnee be *robbed*, he ſhall not be anſwerable

(*p*) Doct. and Stud. *dial.* 2. *ch.* 38.

(*q*) Before, p. 61. note (*o*)

(*r*) Abr. *tit.* Bailment, pl. 7.

ſwerable :(s)" but lord *Coke* ſeems to have uſed the word *ſtolen* in its proper ſenſe, becauſe he plainly compares a pawn with a depoſit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he ſhall be reſponſible for it; and, after a *tender* and *refuſal* of the money owed, which are equivalent to actual *payment*, *the whole property is inſtantly reveſted in the pledgor*, and he may conſequently maintain an action of trover :(t) it is ſaid in a moſt uſeful work, that by ſuch tender and refuſal the thing pawned "ceaſes to be a pledge and becomes a *depoſit* ;(u)" but this muſt be an error of impreſſion; for there can never be a *depoſit* without the owner's conſent, and a *depoſitary* would be chargeable only for *groſs* negligence, whereas the pawnee, whoſe ſpecial property is determined by the wrongful detainer, becomes liable *in all poſſible events*

(s) 2 Salk. 522.

(t) 29 Aſſ. pl. 28. Yelv. 179. *Ratcliff* and *Davis*.

(u) Law of *Niſi Prius*, 72.

events to make good the thing loſt, or to relinquiſh his debt.(*w*)

The reaſon given by *Coke* for his doctrine, namely, "becauſe the pawnee has a *property* in the goods pledged," is applicable to every other ſort of bailment, and proves nothing in regard to any *particular* ſpecies; for every bailee has a temporary *qualified* property in the things, of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action or an appeal in his own name againſt any ſtranger, who may damage or purloin them.(*x*) By the *Roman* law, indeed, "even the poſſeſſion of the depoſitary was holden to be that of the perſon depoſiting;" but with us the general bailee has unqueſtionably a limited property in the goods intruſted to his care: he may not, however, uſe them on any account without the conſent of the owner, either expreſsly given if it can poſſibly be obtained, or at leaſt ſtrongly preſumed; and this preſumption

(*w*) Ld. Raym. 917.
(*x*) Yearb. 21 Hen. VII. 14. b. 15. a.

tion varies, as the thing is likely to be better, or worſe, or not all affected, by uſage; ſince, if *Caius* depoſit a ſetting-dog with *Titius*, he can hardly be ſuppoſed unwilling, that the dog ſhould be uſed for partridge-ſhooting, and thus be confirmed in thoſe habits, which make him valuable; but, if clothes or linen be depoſited by him, one can ſcarce imagine, that he would ſuffer them to be worn; and, on the other hand, it may juſtly be inferred, that he would gladly indulge *Titius* in the liberty of uſing the books, of which he had the cuſtody, ſince even moderate care would prevent them from being injured. In the ſame manner it has been holden, that the pawnee of goods, which will be impaired by uſage, cannot uſe them; but it would be otherwiſe, I apprehend, if the things pawned actually required exerciſe and a continuance of habits, as ſporting-dogs and horſes: if they cannot be hurt by being worn, they may be uſed, but at the peril of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and ſhe wear them at a public place, and be robbed of them

on her return, ſhe muſt make them good: "if ſhe keep them in a bag," ſays a learned and reſpectable writer, "and they are ſtolen, ſhe ſhall not be charged;(y)" but the bag could hardly be taken privately and quietly without her omiſſion of ordinary diligence; and the manner, in which lord *Holt* puts the caſe, eſtabliſhes my ſyſtem, and confirms the anſwer juſt offered to the caſe from the Year-book; for, "if ſhe keep the jewels, ſays he, locked up in her cabinet, and her cabinet be broken open, and the jewels taken thence, ſhe will not be anſwerable.(z)" Again; it is ſaid, that, where the pawnee is at any expenſe to maintain the thing given in pledge, as, if it be a horſe or a cow, he may ride the horſe moderately, and milk the cow regularly, by way of compenſation for the charge;(a) and this doctrine muſt be equally applicable to a general bailee, who ought neither to be injured nor

(y) Law of *Niſi Prius*, 72.

(z) Ld. Raym. 917.

(a) Ow. 124.

nor benefited in any reſpect, by the truſt undertaken by him; but the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depoſitary to milk the cows delivered to them, but requires them to account with the reſpective owners for the value of the milk and calves, deducting the reaſonable charges of their nouriſhment.(*b*) It follows from theſe remarks, that lord *Coke* has aſſigned an adequate reaſon for the degree of diligence, which is demanded of a pawnee; and the true reaſon is, that the law requires nothing extraordinary of him.

But, if the receiver in pledge were the only bailee, who had a ſpecial property in the thing bailed, it could not be logically inferred, "that, therefore, he ought to keep it merely as his own:" for even if *Caius* have an abſolute undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well as poſitive, law to take more care

(*b*) Poth. *Dépôt*, n. 47. *Nantiſſement*, n. 35.

care of them than of his own, unleſs he be in fact a prudent and thoughtful manager of his own concerns: ſince every man ought to uſe ordinary diligence in affairs which intereſt another as well as himſelf: "*Aliena negotia*," ſays the emperor *Conſtantine* "*exacto officio gerantur.*(c)"

The concluſion, therefore, drawn by Sir *Edward Coke*, is no leſs illogical than his premiſes are weak; but here I muſt do M. *Le Brun* the juſtice to obſerve, that the argument, on which his whole ſyſtem is founded, occurred likewiſe to the great oracle of *Engliſh* law; namely, that a perſon, who had a property in things committed to his charge, was only obliged to be as careful of them as of his own goods; and, if that was *Le Brun*'s hypotheſis, he has done little more than adopt the ſyſtem of *Godefroi*, who exacts ordinary diligence from a partner and a coproprietor, but requires a higher degree in eight of the ten preceding contracts.

Pledges

(c) C. 4. 35. 21.

Pledges for debt are of the higheſt antiquity: they were uſed in very early times by the roving *Arabs*, one of whom finely remarks, "that the life of man is no more than a pledge in the hands of Deſtiny;" and the ſalutary laws of *Moſes*, which forbade certain implements of huſbandry and a widow's raiment to be given in pawn, deſerve to be imitated as well as admired. The diſtinction between pledging, where poſſeſſion is transferred to the creditor, and hypothecation, where it remains with the debtor, was originally *Attic*; but ſcarce any part of the *Athenian* laws on this ſubject can be gleaned from the ancient orators, except what relates to bottomry in five ſpeeches of *Demoſthenes*.

I cannot end this article, without mentioning a ſingular caſe from a curious manuſcript preſerved at *Cambridge*, which contains a collection of queries in *Turkiſh*, together with the deciſions or conciſe anſwers of the Mufti at *Conſtantinople*: it is commonly imagined, that the *Turks* have a tranſlation in their own language

guage of the *Greek* code, from which they have ſupplied the defects of their *Tartarian* and *Arabian* juriſprudence ;(*d*) but I have not met with any ſuch tranſlation, although I admit the conjecture to be highly probable, and am perſuaded, that their numerous treatiſes on *Mahomedan* law are worthy on many accounts of an attentive examination. The caſe was this : " *Zaid* had left with *Amru* divers goods in pledge for a certain ſum of money, and ſome ruffians, having entered the houſe of *Amru*, took away his own goods together with thoſe pawned by *Zaid*." Now we muſt neceſſarily ſuppoſe, that the creditor had by his own fault given occaſion to this robbery ; otherwiſe we may boldly pronounce, that the *Turks* are wholly unacquainted with the imperial laws of *Byzantium*, and that their own rules are totally repugnant to natural juſtice ; for the party proceeds to aſk, " whether, ſince the debt become extinct by the loſs of the pledge, and ſince the goods

(*d*) *Duck* de Auth. Jur. Civ. Rom. 1. 2. 6.

goods pawned exceeded in value the amount of the debt, *Zaid* could legally demand the balance of *Amru;*" to which queſtion the great law-officer of the *Othman* court anſwered with the brevity uſual on ſuch occaſions, *Olmaz* it cannot be.*(e)* This cuſtom, we muſt confeſs, of propoſing caſes both of law and conſcience under feigned names to the ſupreme judge, whoſe anſwers are conſidered as ſolemn decrees, is admirably calculated to prevent partiality and to ſave the charges of litigation.

V. The laſt ſpecies of bailment is by no means the leaſt important of the five, whether we conſider the infinite convenience and daily uſe of the contract itſelf, or the variety of its branches, each of which ſhall now be ſuccinctly, but accurately, examined.

1. *Locatio* or *locatio-conductio, rei*, is a contract, by which the hirer gains a tranſient qualified

(*e*) Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. *Hywel Dda.* lib. 2. cap. 2. § 29. *note* x. It may *poſſibly* be the uſage in *Turkey* to *ſtipulate* "ut amiſſio pignoris liberet debitorem," as in C. 4. 24. 6.

qualified property in the thing hired, and the owner acquires an abſolute property in the ſtipend, or price of the hiring; ſo that, in truth, it bears a ſtrong reſemblance to the contract of *emptio-venditio*, or ſale; and, ſince it is advantageous to both contracting parties, the harmonious conſent of nations will be interrupted, and one object of this eſſay defeated, if the laws of *England* ſhall be found, on a fair inquiry, to demand of a hirer a more than ordinary degree of diligence. In the moſt recent publication, that I have read, on any legal ſubject, it is expreſsly ſaid, "that the hirer, is to take all imaginable care of the goods delivered for hire :(*f*)" the words *all imaginable*, if the principles before eſtabliſhed be juſt, are too ſtrong for practice even in the ſtrict caſe of borrowing; but, if we take them in the mildeſt ſenſe, they muſt imply an extraordinary degree of care; and this doctrine, I preſume, is founded on that of lord *Holt*, in the caſe of *Coggs* and *Bernard*, where the great judge

(*f*) Law of *Niſi Prius*, 3d. edition corrected, 72.

judge lays it down, "that if goods are let out for a reward, the hirer is bound to the utmoſt diligence, ſuch as the moſt diligent father of a family uſes.(g)" It may ſeem bold to controvert ſo reſpectable an opinion; but without inſiſting on the palpable injuſtice of making a borrower and a hirer anſwerable for preciſely the ſame degree of neglect, and without urging, that the point was not then before the court, I will engage to ſhow, by tracing the doctrine up to its real ſource, that the *dictum* of the chief juſtice was entirely grounded on a grammatical miſtake in the tranſlation of a ſingle *Latin* word.

In the firſt place, it is indubitable, that his lordſhip relied ſolely on the authority of *Bracton*; whoſe words he cites at large, and immediately ſubjoins, "whence it appears, &c." now the words, "*talis ab eo deſideratur cuſtodia, qualem diligentiſſimus paterfamilias ſuis rebus adhibet*," on which the whole queſtion depends,

(g) Ld. Raym. 916.

pends, are copied exactly from *Juſtinian*,(*h*) who informs us in the *proeme* to his Inſtitutes, that his deciſions in that work were extracted principally from the Commentaries of *Gaius*; and the epithet *diligentiſſimus* is in fact uſed by this ancient lawyer,(*i*) and by him alone, on the ſubject of hiring: but *Caius* is remarked for writing with energy, and for being fond of uſing ſuperlatives, where all other writers are ſatisfied with poſitives;(*k*) ſo that his forcible manner of expreſſing himſelf, in this inſtance as in ſome others, miſled the compilers employed by the emperor, whoſe words *Theophilus* rendered more than literally, and *Bracton* tranſcribed; and thus an epithet, which ought to have been tranſlated ordinarily diligent, has been ſuppoſed to mean extremely careful. By rectifying this miſtake, we reſtore the broken harmony of the pandects with the inſtitutes, which together with the code, form one connected

(*h*) Bract. 62. b. Juſtin. Inſt. 3. 25. 5. where *Theophilus* has ὁ σφόδρα ἐπιμελέστατος.

(*i*) D. 19. 2. 25. 7.

(*k*) Le Brun. p. 93.

nected work,(*l*) and, when properly underſtood, explain and illuſtrate each other; nor is it neceſſary, I conceive, to adopt the interpretation of M. *De Ferriere*, who imagines that both *Juſtinian* and *Gaius* are ſpeaking only of caſes, which from their nature demand extraordinary care.(*m*)

There is no authority then againſt the rule, which requires of a hirer the ſame degree of diligence, that all prudent men, that is, the generality of mankind, uſe in keeping their own goods; and the juſt diſtinction between borrowing and hiring, which the *Jewiſh* lawgiver emphatically makes, by ſaying, "if it be an hired thing it came for its hire,(*n*)" remains eſtabliſhed by the concurrent wiſdom of nations in all ages.

If *Caius* therefore hire a horſe, he is bound to ride it as moderately and treat it as carefully,

(*l*) Burr. 426.

(*m*) *Inſt.* vol. V. p. 138.

(*n*) Exod. xxii. 15.

ly, as any man of *common* diſcretion would ride and treat his own horſe; and if, through his negligence, as by leaving the door of his ſtable open at night, the horſe be ſtolen, he muſt anſwer for it; but not, if he be robbed of it by highwaymen, unleſs by his imprudence he gave occaſion to the robberry, as by travelling at unuſual hours, or by taking an unuſual road: if, indeed, he hire a carriage and any number of horſes, and the owner ſend with them his poſtilion or coachman, *Caius* is diſcharged from all attention to the horſes, and remains obliged only to take ordinary care of the glaſſes and inſide of the carriage, while he ſits in it.

Since the negligence of a ſervant, acting under his maſter's directions, expreſs or implied, is the negligence of the maſter, it follows, that, if the ſervant of *Caius* injure or kill the horſe by riding it immoderately, or, by leaving the ſtable door open, ſuffer thieves to ſteal it, *Caius* muſt make the owner a com-

compenſation

penſation for his loſs ;(o) and it is juſt the ſame, if he take a ready furniſhed lodging, and his gueſts or ſervants, while they act under the authority given by him, damage the furniture by the omiſſion of ordinary care. At *Rome* the law was not quite ſo rigid ; for *Pomponius*, whoſe opinion on this point was generally adopted, made the maſter liable, only when he was culpably negligent in admitting careleſs gueſts or ſervants, whoſe bad qualities he ought to have known :(p) but this diſtinction muſt have been perplexing enough in practice ; and the rule, which, by making the head of a family anſwerable indiſcriminately for the faults of thoſe, whom he receives or employs, compels him to keep a vigilant eye on all his domeſtics, is not only more ſimple, but more conducive to the public ſecurity, although it may be rather harſh in ſome particular inſtances.(q) It may here be obſerved, that

(o) Salk. 282. Ld. Raym. 916.

(p) D. 19. 2. 11.

(q) Poth. *Louage*, n. 193.

that this is the only contract, to which the *French*, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is, bailor, both derived from the old word bailler, to deliver; and, though the contracts, which are the subjects of this essay, be generally confined to moveable things, yet it will not be improper to add, that if immoveable property, as an orchard, a garden, or a farm, be letten by parole, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use, if the orchard, garden, or farm, were his own.

2. *Locatio operis*, which is properly subdivisible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a most extensive influence in civil life; but the principles by which the obligations of the contracting parties may be ascertained, are no less obvi-

ous

ous and rational, than the objects of the contract are often vaſt and important.(r)

If *Titius* deliver ſilk or velvet to a tailor for a ſuit of clothes, or a gem to a jeweller to be ſet or engraved, or timber to a carpenter for the rafters of his houſe, the tailor, the engraver, and the builder are not only obliged to perform their ſeveral undertakings in a workmanly manner :(s) but, ſince they are entitled

(r) It may be uſeful to mention a nicety of the *Latin* language in the application of the verbs *locare* and *conducere :* the employer, who gives the reward, is *locator operis*, but *conductor operarum ;* while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in *Pand.* par. 3. § 320. So in *Horace*,

"Tu ſecanda marmora
Locas"—

which the ſtonehewer or maſon *conduxit*.

(s) 1 Ventr. 268. erroneouſly printed 1 *Vern.* 268. in all the editions of *Bl. Comm.* II. 452. The innumerable multitude of inaccurate or idle references, in our beſt reports and law-tracts, is the bane of the ſtudent and of the practiſer.

entitled to a reward, either by expreſs bargain or by implication, they muſt alſo take ordinary care of the things reſpectively bailed to them: and thus, if a horſe be delivered either to an agiſting farmer for the purpoſe of depaſturing in his meadows, or to an hoſtler to be dreſſed and fed in his ſtable, the bailees are anſwerable for the loſs of the horſe, if it be occaſioned by the ordinary neglect of themſelves or their ſervants. It has, indeed been adjudged, that if the horſe of a gueſt be ſent to paſture by the owner's deſire, the innholder is not, as ſuch, reſponſible for the loſs of him by theft or accident ;(*t*) and, in the caſe of *Moſley* and *Foſſet*, an action againſt an agiſter for keeping a horſe ſo negligently that it was ſtolen, is ſaid to have been held maintainable only by reaſon of a ſpecial aſſumption ;(*u*) but the caſe is differently reported by *Rolle*, who mentions no ſuch reaſon ; and, according to him, chief juſtice *Popham* advanced generally, in

(*t*) 8. Rep. 32. *Calye's* caſe.

(*u*) Mo. 543. 1 Ro. Abr. 4.

in conformity to the principles before eſtabliſhed, that, "if a man, to whom horſes are bailed for agiſtment, leave open the gates of his field, in conſequence of which neglect they ſtray and are ſtolen, the owner has an action againſt him:" it is the ſame, if the innkeeper ſend his gueſt's horſe to a meadow of his own accord, for he is bound to keep ſafely all ſuch things as his gueſts depoſit within his inn, and ſhall not diſcharge himſelf by his own act from that obligation; and, even when he turns out the horſe by order of the owner, and receives pay for his graſs and care, he is chargeable, ſurely, for ordinary negligence, as a bailee for hire, though not as an innkeeper by the general cuſtom of the realm. It may be worth while to inveſtigate the reaſons of this general cuſtom, which in truth means no more than common law, concerning innholders.(*w*)

Although a ſtipend or reward in money be the eſſence of the contract called *locatio*, yet the

(*w*) Reg. Orig. 105. a. Noy. Max. ch. 43.

but alſo that his goods may be ſafe: independently of this reaſoning, the cuſtody of the goods may be conſidered as acceſſary to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius* and as great a man as he, lord *Holt*, ſeems to view the obligation; for they agree, "that, although a bargeman and a maſter of a ſhip receive their fare for the paſſage of travellers, and an innkeeper his pay for the accommodation and entertainment of them, but have no pecuniary reward for the mere cuſtody of the goods belonging to the paſſengers or gueſts, yet they are obliged to take ordinary care of thoſe goods; as a fuller and a mender are paid for their ſkill only, yet are anſwerable, *ex locato* for ordinary neglect, if the clothes be loſt or damaged.*(y)*"

In whatever point of view we conſider this bailment, no more is regularly demanded of the

(y) D. 4. 9. 5. and 12 Mod. 487.

the bailee than the care, which every prudent man takes of his own property; but it has long been holden, that an innkeeper is bound to reſtitution, if the trunks or parcels of his gueſts, committed to him either perſonally or through one of his agents be damaged in his inn, or ſtolen out of it, by any perſon whatever;(z) nor ſhall he diſcharge himſelf from this reſponſibility by a refuſal to take care of the goods, becauſe there are ſuſpected perſons in the houſe, for whoſe conduct he cannot be anſwerable:(a) it is otherwiſe, indeed if he refuſe admiſſion to a traveller, becauſe he really has no room for him, and the traveller, nevertheleſs, inſiſt upon entering, and place his baggage in a chamber without the keeper's conſent.(b)

Add to this, that if he fail to provide honeſt ſervants and honeſt inmates, according to the confidence repoſed in him by the public, his

(z) Yearb. 10 Hen. VII. 26. 2 Cro. 189.
(a) Mo. 78.
(b) Dy. 158. b. 1 And 29.

his negligence in that reſpect is highly culpable, and he ought to anſwer civilly for their acts, even if they ſhould rob the gueſts, who ſleep in his chambers.(c) Rigorous as this law may ſeem, and hard as it may actually be in one or two particular inſtances, it is founded on the great principle of public utility, to which all private conſiderations ought to yield; for travellers, who muſt be numerous in a rich and commercial country, are obliged to rely almoſt implicitly on the good faith of innholders, whoſe education and morals are uſually none of the beſt, and who might have frequent opportunities of aſſociating with ruffians or pilferers, while the injured gueſt could ſeldom or never obtain legal proof of ſuch combinations or even of their negligence, if no actual fraud had been committed by them. Hence the Prætor declared, according to *Pomponius*, his deſire of ſecuring the public from the diſhoneſty of ſuch men, and by his edict gave an action againſt them, if the goods of travellers or paſſengers were loſt or hurt by any

(c) 1 Bl. Comm. 430.

any means, except *damno fatali*, or inevitable accident; and *Ulpian* intimates, that even this ſeverity could not reſtrain them from knaviſh practices or ſuſpicious neglect.(*d*)

In all ſuch caſes, however, it is competent for the innholder to repel the preſumption of his knavery or default, by proving that he took ordinary care, or that the force, which occaſioned the loſs or damage, was truly irreſiſtible.

When a private man demands and receives a compenſation for the bare cuſtody of goods in his warehouſe or ſtoreroom, this is not properly a depoſit, but a hiring of care and attention: it may be called *locatio cuſtodiæ*, and might have been made a diſtinct branch of this laſt ſort of bailment, if it had not ſeemed uſeleſs to multiply ſubdiviſions; and the bailee may ſtill be denominated *locator operæ*, ſince the vigilance and care which he lets out for pay, are in truth a mental operation. Whatever

(*d*) D. 4. 9. 1. and 3.

ever be his appellation, either in *Engliſh* or *Latin*, he is clearly reſponſible, like other intereſted bailees, for ordinary negligence; and, although St. *German* ſeems to make no difference in this reſpect between a keeper of goods for hire and a ſimple depoſitary, yet he uſes the word *default*, like the *culpa* of the Romans, as a generical term, and leaves the degree of it to be aſcertained by the rules of law.(*e*)

In the ſentence immediately following, he makes a very material diſtinction between the two contracts; for, "if a man, ſays he, have a certain recompenſe for the keeping of goods, and promiſe, at the time of the delivery, to redeliver them ſafe at his peril, then he ſhall be charged with all chances, that may befal; but, if he make that promiſe, and have nothing for keeping them, he is bound to no caſualties, but ſuch as are wilful, and happen by his own default:" now the word *peril*, like *periculum*, from which it is derived, is in itſelf ambiguous,

(*e*) *Doct.* and *Stud.* where before cited.

ambiguous, and ſometimes denotes the riſk of inevitable miſchance, ſometimes the danger ariſing from a want of due circumſpection; and the ſtronger ſenſe of the word was taken in the firſt caſe againſt him, who uttered it; but, in the ſecond, where the conſtruction is favourable, the milder ſenſe was juſtly preferred.(*f*) Thus, when a perſon, who, if he were wholly unintereſted, would be a mandatary, undertakes for a reward to perform any work, he muſt be conſidered as bound ſtill more ſtrongly, to uſe a degree of diligence adequate to the performance of it: his obligation muſt be rigorouſly conſtrued, and he would, perhaps, be anſwerable for ſlight neglect, where no more could be required of a mandatary than ordinary exertions. This is the caſe of commiſſioners factors, and bailiffs, when their undertaking lies in feſance, and not ſimply in cuſtody; hence, as peculiar care is demanded in removing and raiſing a fine column of granite or porphyry, without injuring the ſhaft or the

(*f*) See before p. 63.

the capital, *Gaius* ſeems to exact more than ordinary diligence from the undertaker of ſuch a work for a ſtipulated compenſation.(*g*) Lord *Coke* conſiders a factor in the light of a ſervant, and thence deduces his obligation; but, with great ſubmiſſion, his reward is the true reaſon, and the nature of the buſineſs is the juſt meaſure, of his duty;(*h*) which cannot, however, extend to a reſponſibility for mere accident, or open robbery;(*i*) and, even in the caſe of theft, a factor has been holden excuſed, when he ſhewed, "that he had laid up the goods of his principal in a warehouſe, out of which they were ſtolen by certain malefactors to him unknown.(*k*)"

Where ſkill is required, as well as care, in performing the work undertaken, the bailee for hire muſt be ſuppoſed to have engaged himſelf

(*g*) D. 19. 2. 7.

(*h*) 4 Rep. 84. Ld. Raym. 918.

(*i*) 1 Inſt. 89. a.

(*k*) 1 Vent. 121. *Vere* and *Smith*.

ſelf for a due application of the neceſſary art: it is his own fault, if he undertakes a work above his ſtrength; and all, that has before been advanced on this head concerning a mandatary, may be applied with much greater force to a *conductor operis faciendi.*(*l*) I conceive, however, that where the bailor has not been deluded by any but himſelf, and voluntarily employs in one art a man, who openly exerciſes another, his folly has no claim to indulgence; and that, unleſs the bailee make falſe pretenſions, or a ſpecial undertaking, no more can fairly be demanded of him than the beſt of his ability.(*m*) The caſe, which *Sadi* relates with elegance and humour, in his *Guliſtan* or Roſe-garden, and which *Pufendorf* cites with approbation,(*n*) is not inapplicable to the preſent ſubject, and may ſerve as a ſpecimen of *Mahomedan* law, which is not ſo different from ours, as we are taught to imagine:

"A

(*l*) *Spondet*, ſays the *Roman* lawyers, *peritiam artis*.

(*m*) P. 75.

(*n*) De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

"A man, who had a diſorder in his eyes, called on a farrier for a remedy; and he applied to them a medicine commonly uſed for his patients: the man loſt his ſight, and brought an action for damages;" but the judge ſaid, "No action lies, for, if the complainant had not himſelf been an aſs, he would never have employed a farrier;" and *Sadi* proceeds to intimate, that, "if a perſon will employ a common mat-maker, to weave or embroider a fine carpet, he muſt impute the bad workmanſhip to his own folly.(*o*)"

In regard to the diſtinction beforementioned between the *non* feſance and the *mis* feſance of a workman,(*p*) it is indiſputably clear, that an

(*o*) Roſar. Polit. cap. 7. There are numberleſs tracts in *Arabick*, *Perſian*, and *Turkiſh*, on every branch of juriſprudence; from the beſt of which it would not be difficult to extract a complete ſyſtem, and to compare it with our own; nor would it be leſs eaſy, to explain in *Perſian* or *Arabick* ſuch parts of our *Engliſh* law, as either coincide with that of the *Aſiaticks*, or are manifeſtly preferable to it.

(*p*) P. 75. &c.

an action lies in both cases for a reparation in damages, whenever the work was undertaken for a reward, either actually paid, expressly stipulated, or, in the case of a common trader, strongly implied; of which *Blackstone* gives the following instance: "if a builder promises, undertakes, or assumes to *Caius*, that he will build and cover his house within a limited time, and fails to do it, *Caius* has an action on the case against the builder for this breach of his express promise, and shall recover a pecuniary satisfaction for the injury sustained by such delay.(*q*)" The learned author meaned, I presume, a common builder, or supposed a consideration to be given; and for this reason I forbore to cite his doctrine as in point on the subject of an action for the non-performance of a mandatary.(*r*)"

Before we leave this article, it seems proper to remark, that every bailee for pay, whether *conductor rei* or *conductor operis*, must be supposed

(*q*) 3 Comm. 157.

(*r*) P. 78. 81. 84.

poſed to know, that the goods and chattles of his bailor are in many caſes diſtrainable for rent, if his landlord, who might otherwiſe be ſhamefully defrauded, find them on the premiſes;(s) and, as they cannot be diſtrained and ſold without his ordinary default at leaſt, the owner has a remedy over againſt him, and muſt receive a compenſation for his loſs:(t) even if a depoſitary were to remove or conceal his own goods, and thoſe of his depoſitor were to be ſeized for rent arrere, he would unqueſtionably be bound to make reſtitution; but there is no obligation in the bailee to ſuggeſt wiſe precautions againſt inevitable accident; and he cannot therefore, be obliged to adviſe inſurance from fire; much leſs to inſure the things bailed without an authority from the bailor.

It may be right alſo to mention, that the diſtinction, before taken in regard to loans,(u) between

(s) Burr. 1498, &c.
(t) 3 B..Comm. 8.
(u) P. 89. 91.

between an obligation to reſtore the ſpecific things, and a power or neceſſity of returning others equal in value, holds good likewiſe in the contracts of hiring and depoſiting: in the firſt caſe, it is a regular bailment; in the ſecond it becomes a debt. Thus, according to Alfenus in his famous law, on which the judicious *Bynkerſhoek* has learnedly commented, "if an ingot of ſilver be delivered to a ſilverſmith to make an urn, the whole property is transferred, and the employer is only a creditor of metal equally valuable, which the workman engages to pay in a certain ſhape:(*w*)" the ſmith may conſequently apply it to his own uſe; but, if it periſh, even by unavoidable miſchance or irreſiſtible violence, he, as owner of it, muſt abide the loſs, and the creditor muſt have his urn in due time. It would be otherwiſe no doubt, if the ſame ſilver, on account of its peculiar fineneſs, or any uncommon metal, according to the whim of the owner, were agreed

(*w*) D. 19. 2. 31. Bynk. *Obſ. Jur. Rom.* lib. VIII.

agreed to be ſpecifically redelivered in the form of a cup or a ſtandiſh.

3. *Locatio operis* mercium vehendarum is a contract, which admits of many varieties in form, but of none, as it ſeems at length to be ſettled, in the ſubſtantial obligations of the bailee.

A carrier for hire ought, by the rule, to be reſponſible only for ordinary neglect; and, in the time of Henry VIII, it appears to have been generally holden, "that a common carrier was chargeable, in caſe of a loſs by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour :(*x*)" but, in the commercial reign of Elizabeth, it was reſolved, upon the ſame broad principles of policy and convenience, that have been mentioned in the caſe of innholders, "that if a common carrier be robbed

(*x*) Doct. and Stud. where often before cited.

robbed of the goods delivered to him, he ſhall anſwer for the value of them.(y)"

Now the reward or hire, which is conſidered by Sir *Edward Coke* as the reaſon of this deciſion, and on which the principal ſtreſs is often laid in our own times, makes the carrier liable, indeed, for the omiſſion of ordinary care, but cannot extend to irreſiſtible force; and, though ſome other bailees have a recompenſe, as factors and workmen for pay, yet even in *Woodliefe*'s caſe, the chief juſtice admitted, that robbery was a good plea for a factor, though it was a bad one for a carrier the true ground of that reſolution is the public employment exerciſed by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience of ſociety.(z)

The

(y) 1 Inſt. 89. a. Mo. 462. 1 Ro. Abr. 2. *Woodliefe* and *Curtis*.

(z) Ld. Raym. 917. 12 Mod. 487.

The modern rule concerning a common carrier, is, that "nothing will excuſe him, except the act of God, or of the King's enemies ;(*a*)" but a momentary attention to the principles muſt convince us, that this exception is in truth part of the rule itſelf, and that the reſponſibility for a loſs by robbers is only an exception to it : a carrier is regularly anſwerable for neglect, but not regularly, for damage occaſioned by the attacks of ruffians, any more than for hoſtile violence, or unavoidable misfortune ; but the great maxims of policy and good government, make it neceſſary to except from this rule the caſe of robbery, leſt confederacies ſhould be formed between carriers and deſperate villains with little or no chance of detection.

Although the act of God, which the ancients too called Θεῦ ἔλεον and *Vim divinam*, be an expreſſion, which long habit has rendered familiar to us, yet perhaps, on that very account,

count, it might be more proper, as well as more decent, to ſubſtitute it in its place *inevitable accident*; religion and reaſon, which can never be at variance without certain injury to one of them, aſſure us, that "not a guſt of wind blows, nor a flaſh of lightning gleams, without the knowledge and guidance of a ſuperintending mind;" but this doctrine loſes its dignity and ſublimity by a technical application of it, which may in ſome inſtances border even upon profaneneſs; and law, which is merely a practical ſcience, cannot uſe terms too popular and perſpicuous.

In a recent caſe of an action againſt a carrier, it was holden to be no excuſe, "that the ſhip was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a ſmall hole, through which the water had guſhed;(*b*)" but the true reaſon of this deciſion is not mentioned by the reporter: it was in fact at leaſt ordinary negligence,

(*b*) 1 Wils, part 1. 281. *Dale* and *Hall*.

gence, to let a rat do ſuch miſchief in the veſſel; and the *Roman* law has, on this principle, decided, that, ſi fullo veſtimenta polienda acceperit, aeque *mures roſerint*, ex locato tenetur, quia *debuit ab hac re cavere.(c)*".

Whatever doubt there may be, among civilians and common lawyers, in regard to a caſket, the contents of which are concealed from the depoſitary,*(d)* it ſeems to be generally underſtood, that a common carrier is anſwerable for the loſs of a box or parcel, be he ever ſo ignorant of its contents, or be thoſe contents ever ſo valuable, unleſs he make a ſpecial acceptance :*(e)* but groſs fraud and impoſition by the bailor will deprive him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no perſonal communication, the bailee may be conſidered as a ſpecial acceptor :

(c) D. 19. 2. 13. 6.

(d) Before, p. 52, 53, 55.

(e) 1 Stra. 145. *Titchburn* and *White.*

acceptor: this was adjudged in a very modern caſe particularly circumſtanced, in which the former caſes in *Ventris Alleyne*, and *Carthew*, are examined with liberality and wiſdom; but, in all of them, too great ſtreſs is laid on the reward, and too little on the important motives of public utility, which alone diſtinguiſh a carrier from other bailees for hire.*(f)*

Though no ſubſtantial difference is aſſignable between carriage by land and carriage by water, or, in other words, between a waggon and a barge, yet it ſoon became neceſſary for the courts to declare, as they did in the reign of James I. that a common hoyman, like a common waggoner, is reſponſible for goods committed to his cuſtody, even if he be robbed of them;*(g)* but the reaſon ſaid to have been given for this judgment, namely,

(f) Burr. 2298. *Gibbon* and *Paynton*. See 1 Vent. 238. All. 93. Cath. 485.

(g) Hob. *ca.* 30. 2 Cro. 330. *Rich.* and *Kneeland*. "The *firſt* caſe of the kind, ſaid lord *Holt*, to be found in our books." 1 Mod. 480.

namely, becauſe he had his hire, is not the true one; ſince, as we have before ſuggeſted, the recompenſe could only make him liable for temerity and imprudence, as if a bargemaſter were raſhly to ſhoot a bridge, when the bent of the weather is tempeſtuous; but not for a mere caſualty, as if a hoy in good condition, ſhooting a bridge at a proper time, were driven againſt a peer, by a ſudden breeze, and overſet by the violence of the ſhock;(*h*) nor, by parity of reaſon, for any other force too great to be reſiſted:(*i*) the public employment of the hoyman, and that diſtruſt, which an ancient writer juſtly calls the ſinew of wiſdom, are the real grounds of the law's rigour, in making ſuch a perſon reſponſible for a loſs by robbery.

All, that has juſt been advanced concerning a landcarrier, may, therefore, be applied to a bargemaſter or boatman; but, in caſe of a tempeſt,

(*h*) 1 Stra. 128. *Amies* and *Stevens*.

(*i*) Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* moſt learnedly diſcuſſed in *Deſid. Heraldi* Animadv. in *Salmaſii* Obſerv. in Jus *Att. Rom.* cap. xv.

tempeſt, it may ſometimes happen, that the law of *jetſon* and *average* may occaſion a difference. *Barcroft's* caſe, as it is cited by chief juſtice *Rolle*, has ſome appearance of hardſhip: a box of jewels had been delivered to a ferryman, who knew not what it contained, and, a ſudden ſtorm ariſing in the paſſage, he threw the box into the ſea; yet it was reſolved, that he ſhould anſwer for it:(*k*)" now I cannot help ſuſpecting, that there was proof in this caſe of culpable negligence, and probably the caſket was both ſmall and light enough, to have been kept longer on board than other goods; for, in the caſe of *Graveſend* barge, cited on the bench by lord *Coke*, it appears, that the pack, which was thrown overboard in a tempeſt, and for which the bargeman was holden not anſwerable, was of great value and great weight; although this laſt circumſtance be omitted by *Rolle*, who ſays only, that the maſter of the veſſel had no information of its contents.(*l*)

The

(*k*) All. 93.

(*l*) 2 Bulſtr. 280. 2 Ro. Abr. 567.

The ſubtilty of the human mind, in finding diſtinctions, has no bounds; and it was imagined by ſome, that, whatever might be the obligation of a bargemaſter, there was no reaſon to be equally rigorous in regard to the maſter of a ſhip; who, if he carry goods for profit, muſt indubitably anſwer for the ordinary neglect of himſelf or his mariners, but ought not, they ſaid, to be chargeable for the violence of robbers: it was, however, otherwiſe decided in the great caſe of *Mors* and *Slew*, where "eleven perſons armed came on board the ſhip in the river, under pretence of impreſſing ſeamen, and forcibly took the cheſts, which the defendant had engaged to carry;" and though the maſter was entirely blameleſs, yet Sir *Mathew Hale* and his brethren, having heard both civilians and common-lawyers, and, among them, Mr. *Holt*, for the plaintiff, determined on the principles juſt before eſtabliſhed, that the bailor ought to recover.(*m*) This caſe was frequently mentioned afterwards by

(*m*) 1 Vent. 190. 238. Raym. 220.

by Lord *H.*, who ſaid, that "the declaration was drawn by the greateſt pleader in *England* of his time.*(n)*"

Still farther: ſince neither the element, on which goods are carried, nor the magnitude and form of the carriage, make any difference in the reſponſibility of the bailee, one would hardly have conceived, that a diverſity could have been taken between a letter and any other thing. Our common law, indeed, was acquainted with no ſuch diverſity; and a private poſt-maſter was preciſely in the ſituation of another carrier; but the ſtatue of Charles II. having eſtabliſhed a general poſt-office, and taken away the liberty of ſending letters by a private poſt,*(o)* it was thought, that an alteration was made in the obligation of the poſt-maſter general; and, in the caſe of *Lane* and *Cotton*, three judges determined, againſt the fixed and well ſupported opinion of chief juſtice Holt, "that the poſt-maſter was not anſwerable

(*n*) Ld. Raym. 920.

(*o*) 12 Cha. II. ch. 35. See the ſubſequent ſtatutes.

anſwerable for the loſs of a letter with exchequer-bills in it :*(p)*" now this was a caſe of ordinary neglect, for the bills were ſtolen out of the plaintiff's letter in the defendant's office ;*(q)* and, as the maſter has a great ſalary for the diſcharge of his truſt ; as he ought clearly to anſwer for the acts of his clerks and agents ; as the ſtatute, profeſſedly enacted for ſafety as well as diſpatch, could not have been intended to deprive the ſubject of any benefit, which he before enjoyed ; for theſe reaſons, and for many others, I believe that *Cicero* would

(*p*) Carth. 487. 12 Mod. 482.

(*q*) In addition to the authorities before cited, p, 61. n. (*o*), for the diſtinction between a loſs by ſtealth and by robbery, ſee *Dumoulin*, tract. *De eo quod intereſt*, n. 184, and Roſella caſuum, 98. b. This laſt is the book which *St. German* improperly calls *Summæ Roſella*, and by miſquoting which he miſled me in the paſſage concerning the fall of a houſe, p. 95. The words of the author *Trovumala*, are theſe : " Domus tua *minabatur ruinam* ; domus corruit, et interficit equum tibi *commodatum* ; certe non poteſt dici caſus fortuitus ; quia *diligentiſſimus* reparâſſet domum, vel ibi non habitâſſet ; ſi autem domus non minabatur ruinam, ſed *impetu tempeſtatis* validæ corruit, non eſt tibi imputandum.

would have ſaid, that he wrote on a ſimilar occaſion to *Trebatius*, "Ego tamen Scævolæ aſſentior .*(r)*" It would, perhaps, have been different under the ſtatute, if the poſt had been robbed, either by day or by night, when there is a neceſſity of travelling, but even that queſtion would have been diſputable; and here I may conclude this diviſion of my eſſay, with obſerving in the plain but emphatical language of St. German, "that all the former diverſities be granted by ſecondary concluſions derived upon the law of reaſon, without any ſtatute made in that behalf; and, peradventure, laws and the concluſions therein be the more plain, and the more open; for if any ſtatute were made therein, I think verily, more doubts and queſtions would ariſe upon the ſtatute, than doth now, when they be only argued and judged after the common law.*(s)*"

Before I finiſh the hiſtorical part of my eſſay, in which I undertook to demonſtrate, "that

(r) Epiſt. ad. Fam. VII. 22.

(s) *Doct.* and *Stud. dial.* 2. *chap.* 38. laſt ſentence.

"that a perfect harmony subsisted on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom,(t)" I cannot forbear adding a few remarks on the institutions of those nations, who are generally called barbarous, and who seem in many instances to have deserved that epithet: although traces of sound reasoning and solid judgment appear in most of their ordinances.

By the ancient laws of the Wisigoths, which are indeed rather obscure, the "keeper of a horse or an ox for hire, as well as a hirer for use, was obliged, if the animal perished, to return another of equal worth:" the law of the *Baiuvarians*, on this head is nearly in the same words; and the rule is adopted with little alteration in the capitularies of *Charlemagne* and *Lewis the Pious,(u)* where the *Mosaic* law before cited concerning a borrower may

also

(t) P. 17.

(u) Lindenbrog, LL. *Wisigoth*, lib. 5. tit. 5. § 1, 2, 3. and LL. *Baiuvar*, tit. 14. § 1, 2, 3, 4. *Capitul*, lib. 5. § 204.

alſo be found.(w) In all theſe codes a depoſitary of gold, ſilver, or valuable trinkets, is made chargeable, if they are deſtroyed by fire, and his own goods periſh not with them; a circumſtance which ſome other legiſlators have conſidered as concluſive evidence of groſs neglect or fraud: thus, by the old *Britiſh* tract, called the book of Cynawg, a perſon, who had been robbed of a depoſit, was allowed to clear himſelf by making oath, with compurgators, that he had no concern in the robbery, unleſs he had ſaved his own goods; and it was the ſame, I believe, among the *Britons* in the caſe of a loſs by fire, which happened without the fault of the bailee; although Howel the Good ſeems to have been rigorous in this caſe, for the ſake of public ſecurity.(x) There was one regulation in the northern code, which I have not ſeen in that of any other nation: if precious things

(w) *Capitul.* lib. 6. § 22. Exod. xxii. 14, 15.

(x) LL. *Hywel Dda.* lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See alſo *Stiernh.* De Jur. Sveon p. 256. 257.

things were depoſited and ſtolen, time was given to ſearch for the thief; and, if he could not be found within the time limited, a moiety of the value was to be paid by the depoſitary to the owner, "ut damnum ex medio uterque ſuſtineret.(y)"

Now I can ſcarce perſuade myſelf, that the phraſe uſed in theſe laws, *ſi id perierit*, extends to a periſhing by inevitable accident; nor can I think, that the old *Gothic* law, cited by *Stiernhook*, fully proves his aſſertion, that "a depoſitary was reſponſible for irreſiſtible force;" but I obſerve, that the military law givers of the north, who entertained very high notions of good faith and honour, were more ſtrict than the *Romans* in the duties, by which depoſitaries and other truſtees were bound: an exact conformity could hardly be expected between the ordinances of poliſhed ſtates, and thoſe of a people, who could ſuffer diſputes concerning bailments, to be decided by combat; for it was the Emperor *Frederick* II. who aboliſhed the

(y) LL. *Wiſigoth.* lib. 5. tit. 5. § 3.

the trial by battle in cafes of conteſted depoſits, and ſubſtituted a more rational mode of proof.(z)

I purpoſely reſerved to the laſt the mention of the Hindu, or Indian code, which the learning and induſtry of my much-eſteemed friend Mr. *Halhed* has made acceſſible to *Europeans*, and the Perſian tranſlation of which I have had the pleaſure of ſeeing: theſe laws, which muſt in all times be a ſingular object of curioſity, are now of infinite importance; ſince the happineſs of millions, whom a ſeries of amazing events has ſubjected to a *Britiſh* power, depends on a ſtrict obſervance of them.

It is pleaſing to remark the ſimilarity, or rather identity, of thoſe concluſions, which pure unbiaſſed reaſon in all ages and nations ſeldom fails to draw, in ſuch juridical inquiries as are not fettered and manacled by poſitive inſtitution; and, although the rules of the *Pandects*

(z) LL. *Longobard.* lib. 2. tit. 55. § 35. *Conſtit. Neapol.* lib. 2. tit. 34.

Pandects concerning ſucceſſion to property, the puniſhment of offences, and the ceremonies of religion, are widely different from ours, yet, in the great ſyſtem of contracts and the common intercourſe between man and man, the *Pootee* of the *Indians* and the *Digeſt* of the *Romans* are by no means diſſimilar.(*a*)

Thus, it is ordained by the ſages of *Hinduſtan*, that "a depoſitor ſhall carefully inquire into the character of his intended depoſitary; who, if he undertake to keep the goods, ſhall preſerve them with care and attention; but ſhall not be bound to reſtore the value of them, if they be ſpoiled by unforeſeen accident, or burned, or ſtolen; unleſs he conceal any part of them, that has been ſaved, or unleſs his own effects be ſecured, or unleſs the accident happen after his refuſal to redeliver the goods on a demand made by the depoſitor, or

(*a*) "Hæc omnia, ſays *Grotius*, *Romanis* quidem congruunt legibus, ſed non ex illis primitus, ſed ex *æquitate naturali*, veniunt: quare eadem apud alias quoque gentes reperire eſt." De Jure *Belli* ac *Pacis* lib 2. cap. 12. § 13.

or while the depoſitary, againſt the nature of the truſt, preſumes to make uſe of them: in other words, the bailee is made anſwerable for fraud, or for ſuch negligence as approaches to it.(*b*)"

So, a borrower is declared to be chargeable even for caſualty or violence, if he fail to return the thing after the completion of the buſineſs, for which he borrowed it; but not, if it be accidentally loſt or forcibly ſeized, before the expiration of the time, or the concluſion of the affair, for which it was lent:(*c*) in another place, it is provided, that if a pledge be damaged or loſt by unforeſeen accident, the creditor ſhall nevertheleſs recover his debt with intereſt, but the debtor ſhall not be entitled to the value of his pawn;(*d*) and that, if the pledgee uſe the thing pledged, he ſhall pay the value of it to

(*b*) *Gentoo* Laws, chap. IV. See before, p. 66.

(*c*) Same chapter. See before, p. 96.

(*d*) Chap. I. Sect. I. Before, p. 117, 119.

to the pledgor in the caſe of its loſs or damage, whilſt he uſes it. (*e*)

In the ſame manner, if a perſon hire a thing for uſe, or if any metal be delivered to a workman, for the purpoſe of making veſſels or ornaments, the bailees are holden to be diſcharged, if the thing bailed be deſtroyed or ſpoiled by natural misfortune, or the injuſtice of the ruling power, unleſs it be kept after the time limited for the return of the goods, or the performance of the work. (*f*)

All theſe proviſions are conſonant to the principles eſtabliſhed in this eſſay; and I cannot help thinking, that a clear and conciſe treatiſe, written in the *Perſian* or *Arabian* language, on the law of Contracts, and evincing the general conformity between the *Aſiatic* and *European* ſyſtems, would contribute, as much as

(*e*) Chap. I. Sect. II. Before, p. 112.

(*f*) Chap. IV. and Chap. X. Before, 125. 127.

as any regulation whatever, to bring our *English* law into good repute among thoſe, whoſe fate it is to be under our dominion and whoſe happineſs ought to be a ſerious and continual object of our care.

Thus have I proved, agreeably to my undertaking, that the plain elements of natural law, on the ſubject of Bailments, which have been traced by a ſhort analyſis, are recogniſed and confirmed by the wiſdom of nations ;(g) and I haſten to the third, or ſynthetical part of my work, in which, from the nature of it, moſt of the definitions and rules, already given, muſt be repeated with little variation in form, and none in ſubſtance : it was at firſt my deſign, to ſubjoin, with a few alterations, the *Synopſis* of *Delrio* ; but finding, that, as *Bynkerſhock* expreſſes himſelf with an honeſt pride, I had leiſure ſometimes to write, but never to copy, and thinking it unjuſt to embelliſh any production of mine with the inventions of another, I changed my plan ; and ſhall barely recapitulate the doctrine expounded in

(g) Before, p. 4. 17.

in the preceding pages, obſerving the method, which logicians call *Syntheſis*, and in which all ſciences ought to be explained.

I. To begin then with definitions: 1. Bailment is a delivery of goods in truſt, on a contract expreſſed or implied, that the truſt, ſhall be duly executed, and the goods redelivered, as ſoon as the time or uſe, for which they were bailed, ſhall have elapſed or be performed.

2. Depoſit is a bailment of goods, to be kept for the bailor without a recompenſe.

3. Mandate is a bailment of goods, without reward, to be carried from place to place, or to have ſome act preformed about them.

4. Lending for uſe is a bailment of a thing for a certain time to be uſed by the borrower without paying for it.

5. Pledging

5. Pledging is a bailment of goods by a debtor to his creditor to be kept till the debt be diſcharged.

6. Letting to hire is 1. a bailment of a thing to be uſed by the hirer for a compenſation in money; or, 2. a letting out of work and labour to be done, or care and attention to be beſtowed, by the bailee on the goods bailed, and that for pecuniary recompenſe; or, 3. of care and pains in carrying the things delivered from one place to another for a ſtipulated or implied reward.

7. Innominate bailments are thoſe, where the compenſation for the uſe of a thing, or for labour and attention, is not pecuniary, but either 1. the reciprocal uſe or the gift of ſome other thing; or, 2. work and pains, reciprocally undertaken; or, 3. the uſe or gift of another thing in conſideration of care and labour, and converſely.

8. Ordinary

8. Ordinary neglect is the omiſſion of that care which every man of common prudence, and capable of governing a family, takes of his own concerns.

9. Groſs neglect is the want of that care, which every man of common ſenſe, how inattentive ſoever, takes of his own property.

10. Slight neglect is the omiſſion of that diligence which very circumſpect and thoughtful perſons uſe in ſecuring their own goods and chattels.

11. A naked contract is a contract made without conſideration or recompenſe.

II. The rules, which may be conſidered as axioms flowing from natural reaſon, good morals, and ſound policy, are theſe:

1. A bailee, who derives no benefit from his undertaking, is reſponſible only for groſs neglect.

2. A

2. A bailee, who alone receives benefit from the bailment, is reſponſible for ſlight neglect.

3. When the bailment is beneficial to both parties, the bailee muſt anſwer for ordinary neglect.

4. A ſpecial agreement of any bailee to anſwer for more or leſs, is in general valid.

5. All bailees are anſwerable for actual fraud, even though the contrary be ſtipulated.

6. No bailee ſhall be charged for a loſs by inevitable accident or irreſiſtible force, except by ſpecial agreement.

7. Robbery by force is conſidered as irreſiſtible; but a loſs by private ſtealth is preſumptive evidence of ordinary neglect.

8. Groſs neglect is a violation of good faith.

9. No

9. No action lies to compel performance of naked contract.

10. A reparation may be obtained by ſuit for every damage occaſioned by an injury.

11. The negligence of a ſervant, acting by his maſter's expreſs or implied order, is the negligence of the maſter :

III. From theſe rules the following propoſitions are evidently deducible :

1. A depoſitary is reſponſible only for groſs neglect ; or, in other words, for a violation of good faith.

2. A depoſitary, whoſe character is known to his depoſitor, ſhall not anſwer for mere neglect, if he take no better care of his own goods, and they alſo be ſpoiled or deſtroyed.

3. A mandatary to carry is reſponſible only for groſs neglect, or a breach of good faith.

4. A

4. A mandatary to perform a work is bound to uſe a degree of diligence adequate to the performance of it.

5. A man cannot be compelled by action to perform his promiſe of engaging in a depoſit or a mandate.

6. A reparation may be obtained by ſuit for damage occaſioned by the nonperformance of a promiſe to become a depoſitary or a mandatary.

7. A borrower for uſe is reſponſible for ſlight negligence.

8. A pawnee is anſwerable for ordinary neglect.

9. The hirer of a thing is anſwerable for ordinary neglect.

10. A workman for hire muſt anſwer for ordinary neglect of the goods bailed, and apply a degree of ſkill equal to his undertaking.

11. A letter to hire of his care and attention is reſponſible for ordinary negligence.

12. A carrier for hire, by land or by water, is anſwerable for ordinary neglect.

IV. To theſe rules and propoſitions there are ſome exceptions:

1. A man, who ſpontaneouſly and officiouſly engages to keep, or to carry, the goods of another, though without reward, muſt anſwer for ſlight neglect.

2. If a man, through ſtrong perſuaſion and with reluctance, undertake the execution of a mandate, no more can be required of him than a fair exertion of his ability.

3. All bailees become reſponſible for loſſes by a caſualty or violence, after their refuſal to return the things bailed on a lawful demand.

4. A borrower and a hirer are anſwerable in all events, if they keep the things borrowed

or

or hired after the ſtipulated time, or uſe them differently from their agreement.

5. A depoſitary and a pawnee are anſwerable in all events, if they uſe the things depoſited or pawned.

6. An innkeeper is chargeable for the goods of his gueſt within his inn, if the gueſt be robbed by the ſervants or inmates of the keeper.

7. A common carrier, by land or by water, muſt indemnify the owner of the goods carried, if he be robbed of them.

V. It is no exception, but a corollary, from the rules, that "every bailee is reſponſible for a loſs by accident or force, however inevitable or irreſiſtible, if it be occaſioned by that degree of negligence, for which the nature of his contract makes him generally anſwerable;" and I may here conclude my diſcuſſion of this important title in juriſprudence with a general and obvious remark; that "all the preceding rules and propoſitions may be diverſified to

to infinity by the circumſtances of every particular caſe ; on which circumſtances it is on the continent the province of a judge appointed by the ſovereign, and in England, to our conſtant honour and happineſs, of a jury freely choſen by the parties, finally to decide : thus, when a painted cartoon, paſted on canvaſs, had been depoſited, and the bailee kept it ſo near a damp wall, that it peeled and was much injured, the queſtion " whether the depoſitary had been guilty of groſs neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refuſed to grant a new trial ;*(h)* but it was the judge who determined, that the defendant was by law reſponſible for groſs negligence only ; and, if it had been proved, that the bailee had kept his own pictures of the ſame ſort in the ſame place and manner, and that they too had been ſpoiled, a new trial would, I conceive, have been granted ; and ſo, if no more than ſlight neglect had been committed, and the

(h) 2 Stra. 1099. *Mytton* and *Cock*.

the jury had, nevertheleſs, taken upon themſelves to decide againſt law, that a bailee without reward was reſponſible for it.

Should the method uſed in this little tract be approved, I may poſſibly not want inclination, if I do not want leiſure, to diſcuſs in the ſame form every branch of Engliſh law, civil and criminal, private, and public; after which it will be eaſy to ſeparate and mould into diſtinct works, the three principal diviſions, or the analytical, the hiſtorical, and the ſynthetical, parts.

The great ſyſtem of juriſprudence, like that of the Univerſe, conſiſts of many ſubordinate ſyſtems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully perſuaded myſelf, is reducible to a few plain elements, either the wiſe maxims of national policy and general convenience, or the poſitive rules of our forefathers, which are ſeldom deficient in wiſdom or utility: if Law be a ſcience, and really de-

ſerves ſo ſublime a name, it muſt be founded on principle, and claim an exalted rank in the empire of reaſon; but, if it be merely an unconnected ſeries of decrees and ordinances, its uſe may remain, though its dignity be leſſened, and He will become the greateſt lawyer, who has the ſtrongeſt habitual, or artificial memory. In practice, law certainly employs two of the mental faculties; reaſon, in the primary inveſtigation and deciſion of points entirely new; and memory, in tranſmitting to us the reaſon of ſage and learned men, to which our own ought invariably to yield, if not from a becoming modeſty, at leaſt from a juſt attention to that object, for which all laws are framed, and all ſocieties inſtituted, the good of mankind.

THE END.

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