[646] EASTER TERM, 13 WILL. 3, B. R. 1701.

Sir John Holt, Chief Justice. Sir John Turton, Sir Littleton Powys, Sir Henry Gould, Justices.

LANE *vers.* SIR ROBERT COTTON AND SIR THOMAS FRANKLAND.

Intr. Pasch. 10 Will. 3, B. R. Rot. 403.

[Referred to, *Bennett* v. *Bayes*, 1860, 29 L. J. Ex. 227; *Mersey Docks* v. *Gibbs*, 1866, L. R. 1 H. L. 111; *Bainbridge* v. *Postmaster-General*, [1906], 1 K. B. 186.]

S. C. Com. 100. 11 Mod. 12. Salk. 17. Holt, 582, with the arguments of counsel, Carth. 487, and very much at large, 12 Mod. 482. Pleadings 2 Mod. Ent. 108.

The head of a public office under Government with power to appoint and remove the servants of the office who are to be paid by, and give at his discretion security to Government is not responsible to an individual for a loss occasioned by the default of such servants. The servant who is guilty of the default, is. The post-master general is not answerable for a packet delivered to the receiver at the post office and lost out of the office. S. C. 5 Mod. 455. R. acc. Cowp. 754. But the receiver is.

The plaintiff brought an action upon his case against the defendants as post-master general, for that, that a letter of the plaintiff's, being delivered into the said office, to be sent by the post from London to Worcester, by the negligence of the defendants in the execution of their office, was opened in the office, and divers Exchequer bills therein inclosed were taken away, ad damnum, &c. Upon not guilty pleaded, this case was tried before Holt Chief Justice at Guildhall in London, and a special verdict found there.

The jury found the Act of 12 Car. 2, c. 35, of the erection of the general post-office, and that a general post was established pursuant to it between London and Worcester: they find the Act of 1 Jac. 2, c. 12, which consolidates the estates in fee and in tail in the said office in the King; that the defendants were constituted post-master general by letters patent of the King that now is, bearing date the first year of his reign under the Great Seal of England, pursuant to the said Act of 12 Car. 2, c. 35, and that by the said patent they had power to make deputies, and to appoint servants, at their pleasure, and to take security of them, but in the name, and to the use of the King, and that the de-**[647]**-fendants should obey such orders as they should receive from time to time from the King under the sign manual, and as to the management of the revenue, that they should obey the orders of the Treasury, and farther that the King granted to them, that they should not be chargeable, to account for the mismanagement or default of their inferior officers, but only for their own voluntary defaults; and farther the King granted to them the salary of 1500l. per annum out of the profits arising out of the office, &c. that the office was kept in London; that the plaintiff being possessed of eight Exchequer bills, inclosed them in a letter directed to John Jones, at Worcester, and delivered it to Underhill Breese the receiver of the letters at the post office; that Breese was appointed by the defendants to receive the letters at the office, and was removable by the defendants, but received his salary out of the revenue of the said office by the hands of the receiver-general; that the letter was opened in the office by a person unknown, and the bills were taken away; et si, &c.

This case was argued several times at the Bar by Sir Bartholomew Shower, Mr. Northey, and Mr. Pratt, for the plaintiff; and by Serjeant Wright, the Solicitor General Hawles, and the Attorney General Trevor, for the defendants. And now this term the Judges pronounced their opinions in solemn arguments, viz. Turton, Powys, and Gould, Justices, that judgment ought to be given for the defendants: and Holt, that judgment ought to be for the plaintiff.

Gould Justice said, that at first he was of opinion with the plaintiff, and now upon great consideration he had changed it. And he founded his present opinion upon

consideration, 1. Of the design of the Act, and nature of the office, which is stiled in the Act a letter office, and not regarded there as an absolute security for dispatches, but for promotion of trade in procuring speedy dispatches. If a letter had barely miscarried, the defendants could not have been chargeable for it; for though there is property in a letter, yet it is not a valuable property, for which a man shall recover damages. Letters in their nature are missive, and transient from hand to hand, and therefore difficult, if not impossible, to be secured. And therefore he denied the assertion at the Bar, that the action would lie for the miscarriage of a letter, like Yelv. 63, where it is held, that the value of the bond is that of the debt, not of the wax and paper. Which determines this case, because the Exchequer bills being inclosed in a letter (though they are bills of credit,) yet are estimable only as a letter. For whatsoever is carried by the post, has the denomination of a letter.

[648] 2. If any thing can support this action, it must be a contract expressed or implied; but here is neither the one nor the other. The security of the dispatches depends upon the credit of the office, as founded upon the Act. Breese is as much an officer as the defendants, but they are more general officers. But Breese is the King's officer, and if there is any contract, it is between the plaintiff and Breese; which appears by the Act, which appoints several acts for all, and puts confidence in all. And therefore they resemble a community of officers acting in several trusts; and every one shall answer for himself, not one for the act of another; as in case of a dean and chapter, 1 Edw. 5, 5 a. If the defendants had died, yet Breese would have continued officer; and therefore Breese has a charge and trust of himself, and is not a deputy to the defendants.

3. This office is founded in Government, and reposed in the King; and it cannot be answerable for defaults, but the remedy is, upon application to the King to procure the officer to be turned out. Dier, 238. In the Act, par. 10 and 15, penalties are imposed upon the post-master general for default in his office, so that the Parliament has provided punishment, and did not intend, that he should be liable to actions. In par. 7, the Act appoints the delivery of letters, &c. brought by masters of ships, &c. from beyond the sea to the deputies of the post-master; which shews that the Act did not intend, to charge the post-master general. And the inconvenience recited to have happened before by miscarriage of letters, par. 6, seems to shew, that no action lay for the miscarriage of a letter; and then this Act did not design to give a greater security by any other means than by alteration of the method.

4. It is inconsistent with the nature of the thing, that the post-master general should be liable, because they could not give caution of the receipt of a letter to be sent by the post, as the master of a ship, inn-keeper, or carrier, may of the receipt of goods. Besides, that this office is so extensive, and requires such a number of servants, &c. speed in conveyance, journeys by day and night, when there is no guard in the country: and therefore it resembles the case of piracy, which is damnum fatale. 4 Co. 84. Robbery a good plea for (*a*)[1] a factor, because he is obliged to expose the goods to sale, and hath them not in safe custody, as a bailee hath. An inn-keeper shall (*b*)[1] not answer for a horse of a guest put to grass by his order for the same reason. Plowd. 308 b. gives the reason, why a (*c*)[1] parol promise shall not bind without consideration, because it passes lightly from a man without deliberation. So here, all is done in a hurry, and then a letter may easily be taken away and the plaintiff is no stranger to these difficulties.

[649] 5. Objection. 1 Vent. 190, 238. Answer. The reasons of the said case do not hold here. For here the defendants have only a salary for executing of part of the office. It is the recompence that binds the contract. Now that is properly, where it is variable according to the hazard; but here the reward is settled, and so small that it is not proportionable to the hazard. As to the second reason given there, that the master is an officer; that is not the only reason, though the action would not lie, if he was a servant. 3. The postmaster-general cannot give caution for the receipt of a letter.

6. The trust is only to carry letters. And therefore Breese having received Exchequer bills, which are treasure, Breese has exceeded his authority (admitting that the defendants were chargeable by the act of Breese) and therefore the defendants are not liable. 9 H. 6, 53 b. Cro. Jac. 468. Doct. & Stud. 137. F. N. B. 71 f.

7. If this action lay, it would be of very mischievous consequence, because it would expose the defendants to all the frauds of the merchants men. As a man might rob the mail of that which he himself put into a letter, and afterwards bring an action and recover it, &c. And many of the same reasons were agreed by the other two Judges, who argued for the defendants.

Powys Justice agreed, that if such an office had been erected at common law by a private man for gain, an action would have lain at common law against him for a miscarriage. Hob. 17. Cro. Jac. 330. 1 Sid. 36.

He differed from Gould Justice as to the matter of Exchequer bills; for he held, that they were not treasure, but bare bills of credit; and that the word packets in the Act was general, and could not be confined to any particular sort of things more than another. And therefore jewels (by him) might be sent by the post in packets.

3. He observed, that the Parliament in assessing the price had regard only to the size or weight, and not to the value, as how many sheets or ounces; which argues, that the Parliament did not intend that the postmaster-general should be answerable for them, if they were lost.

4. He held, that an action would lie against Underhill Breese, and therefore the plaintiff is not without remedy.

[650] 5. The express words of the patent are, that the defendants shall not answer for the default of the inferior officers.

6. The defendants have not the power of the management of the office according to their discretion, but are subject to the controul of the King and of the Treasury. And because the inferior offices are servants of the King, and not of the defendants, their wages being paid to them out of the revenue of the post-office, and the security taken of them in the name of the King; and therefore it is unreasonable, that the defendants should be answerable for the acts of the inferior officers. But it would have been otherwise (by him) if the office had been farmed.

Turton Justice added, that this office was not designed for the conveyance of things of value, and therefore it would not be material, whether Exchequer bills were treasure or not, if they were valuable.

2. Exchequer bills were newly invented, and not known at the time of the making of the Act, and therefore could not be intended to be within it.

3. He cited a record out of Molloy, 24 Ed. 3, n. 45, that the master may reimburse himself out of the wages of the mariners, if the loss happened by their negligence; which would distinguish the case of the master of a ship from this of the postmaster-general.

4. He cited the case of *Herbert* v. *Pagett*, Raym. 53. 1 Sid. 77, where it was held, that an action would not lie against the custos brevium, for so negligently keeping of the records, that a particular record was lost; because other clerks besides his had access to the office. And here there are many persons who have access to the post-office. And for these reasons these three Judges held, that judgment ought to be entered for the defendants.

Holt Chief Justice e contra argued, that judgment ought to be given for the plaintiff. And he said, that he would not make it any part of the question, if a letter was broke open upon the road, whether the postmaster-general should be chargeable for it; but he would confine himself to the present question, where a letter was delivered at the office to the proper officer appointed to receive it, and there lost, whether in such case the postmaster-general shall be liable. And he held, that he should, for these reasons.

[651] 1. Because the postmaster is by this Act intrusted with the interest and property of the subject, to the end that no damage may accrue to him; which is implied by the making him an officer. The Act appoints one general letter office to be erected in London, and the care thereof is committed to the postmaster-general; who, his deputies and servants, ought to have the management solely of the post-office. So that all the persons concerned are as his deputies. And by the nature of the trust he ought safely to keep all letters there at his peril in his custody. This case does not differ from the case of the marshal of the King's Bench, or warden of the Fleet, who are obliged safely to keep the prisoners at their peril; and it is no plea for them, that traitors broke the prison against their will. 33 H. 6, 1. And the

law was so at common law in case of damages recovered in trespass quare vi et armis, and when the statute 25 Ed. 3, c. 17, made the body liable to execution for debt, the gaoler ought to keep such, as safely as defendants condemned for damages in trespass vi et armis. The same law, if goods levied upon a levari facias (which was the only execution before the statute gave a fieri facias) in execution were rescued from the sheriff, he was liable to an action. The same law of a man in execution upon the Statute of 13 Ed. 1, st. 3, de Mercatoribus. The same law, if upon an extendi facias upon a statute merchant the goods of the conusor taken by the sheriff were rescued from him. And there is no difference between this case of the postmaster-general, and the gaoler, sheriff, &c. for he ought safely to keep the letters delivered to him, as the others ought safely to keep their prisoners, or goods taken in execution.

2. The subject ought to pay a premium for the carriage, to him who makes it his employment. And when a man takes an employment upon him, to receive the goods of the subjects, and receives a premium for it, that (a)[2] is sufficient to charge him to answer the loss at all adventures, for such losses as happen within the realm. Cro. Jac. 188. Hob. 17.

Objection by Gould Justice. That this office is founded in Government.

Answer. If he means, that it is founded by the law; he could not agree his inference, because it is only founded by a different sort of law, viz. the one by common law, the other by statute law, which cannot make a difference. And he did not see in what sort of Government it was otherwise founded, but only that a trust is given for the benefit of the subject.

[652] Objection by Gould Justice. That such charge ought to be by some sort of contract.

Answer. He denied that any contract was necessary, to charge the defendants; but it is like the cases, where officers by course of law receive goods for the benefit of others, they are obliged to keep them safely by them, so that they may have the benefit of them.

Objection. The defendants received no premium from the plaintiff.

Answer. The plaintiff gives a premium, which intitles him to a remedy; and against whom shall he have it, if not against the public officer, against the postmaster-general, by whose negligence he suffers. 2. The defendants received a premium, viz. a salary of 1500l. per annum (which is a sufficient reward) paid out of the profits of the office. And therefore this case is not distinguishable from the case of *Mors* v. *Slue*, 1 Ventr. 190, 238. Raym. 220, in which case the objection was, that the master of the ship did not receive the freight to his own use; but yet adjudged, that he was liable for the goods of which the ship was robbed in the river: and the reasons given were, 1. Because he was an officer known; 2. Because he received his salary out of that which was paid for freight; both which reasons hold in this case.

Objection. The master of the ship might take caution, &c. the postmaster-general cannot.

Answer. He did not know how the master of the ship could take caution, &c. It was said in the case of *Mors* v. *Slue*, that if a man came to lade goods at an unseasonable time, he was not obliged to take them in, as before he was ready to sail. But if he takes them in before, and they are lost, he will be liable to an action. So a common carrier may refuse to admit goods into his warehouse, before he is ready to take his journey; but yet neither the one nor the other can refuse to do the duty incumbent upon them by virtue of their public employment.

3. This case is within the same reason and equity upon which the cases are founded, in which men are chargeable for negligent keeping; and this is the reason, that if they should not be charged without assigning a particular neglect, they might defraud any man, as he would not be able to prove it; and that is the reason of the cases of carriers, &c. And this reason is given in Justinian, lib. 4, tit. 5. Minsinger. Comment. fol. 5617. Such matter is transacted **[653]** among a multitude of people, and therefore no particular of them can be charged; and therefore the officer ought to be charged, who chuses such inferior officers. The case of *Mors* v. *Slue* was harder, because there the servants were overcome by a superior force.

Objection. The common carrier may sue the hundred, the postmaster-general cannot sue any body.

Answer. That is no reason, because a carrier was chargeable before the Statute of Winton, at which time he could (*a*)[3] not sue the hundred. Besides, that he is liable, where he has no remedy against the hundred; as for goods lost out of his warehouse, or out of his waggon in the yard.

Objection. The innkeeper is only chargeable for goods in his custody within his inn, and not for a horse put to grass, and therefore it differs from this case.

Answer. Here the letter was within the walls of the post-house. But the case of the innkeeper is stronger, because he obliged, while he has room, to let in all travellers. But e contra of the postmaster-general, who may chuse his deputies and servants.

Objection. The innkeeper has people up all the night in the inn.

Answer. And the postmaster-general also in the post-office.

Objection. The case of *Sir Henry Herbert and Mr. Paget*, 1 Sid. 77. Raym. 53.

Answer. There prima facie they held the defendant chargeable, but afterwards they were of opinion for the defendant, that he was not chargeable, because the clerks of Mr. Henley had liberty to enter into the Treasury without his consent, and so the access to the records was not confined to his servants only. But here no body could enter into the post-office but the servants of the defendants only. This case differs from the loss of a letter upon the road, but to that he gave no opinion; for a carrier receives goods, safely to keep, and safely to carry; but the postmaster-general receives the letters, safely to keep and send; so that there may be a question, whether the postmaster shall be chargeable, when he has safely sent the letters out of the office. But admit that he should not be liable, when the post-boy is robbed upon the road; yet it will not follow, that he is **[654]** not chargeable for letters taken out of the office. In the case of *Morse* v. *Slue*, if the ship had been at sea, the master would not have been liable; yet it does not follow, that he shall not be chargeable for a loss at land. If a man comes to an inn, and orders the innkeeper to put his horse into the stable, being hot, and to let him cool, and then to put him to grass; because the innkeeper should not be chargeable, if he were stole after he is put to grass, it does not follow from thence that he should not be chargeable, if he be stole before he be turned to grass, whilst he is in the stable.

4. It is the duty of the postmaster to receive Exchequer bills, and to send them by the mail. For he ought to receive such packets as are proper to be sent by the post; and such are Exchequer bills.

1. If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing a guest, when he has room, against a carrier refusing to carry goods, when he has convenience, his waggon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the postmaster, for refusing to receive a letter, &c.

2. Exchequer bills are proper to be sent by the post. The Act does not confine it to any specific thing, but generally of packets. It appears, that the Act intended that other things should be sent by the post, as well as letters. By the words of the Act, deeds and other things. Also Exchequer bills are light. And a pearl necklace of 1000l. value may be sent by the post.

Objection. Exchequer bills are new things created by Act of Parliament.

Answer. A new interest created by a subsequent statute will (*a*)[4] be under the same remedy as a thing in esse before of the same nature. And one may as well say, that trover or trespass will not lie for them, because they are new things. Bills of exchange might have been sent by the post, and Exchequer bills are like to them. A bill of exchange payable to a man or bearer is a lawful bill of exchange, and may be sent by the post, as well as one payable to a man or order.

[655] Objection. That the postmaster will not be chargeable for bills of exchange lost, because they are excepted out of the Act, that nothing shall be paid for them.

Answer. That the letter ought to be intended to be written for the sake of the bill, and therefore payment of the letter is payment for the bill. As where a man comes to an inn, he shall pay nothing for the keeping of his goods; yet the advantage which the innkeeper hath by the presence of the guest, makes him liable.

3. Exchequer bills are not excepted, and therefore shall pay postage.

4. The defendants being public officers are chargeable, though they had no benefit; as the sheriff, though (*a*)[5] he has no fees for suing of executions. For where the law gives a man custody of a thing virtute officii it obliges him to keep it safely. And therefore upon the reason of *Southcote's case*, 4 Co. 83 b. Cro. El. 8, 5, pl. 4, if goods are delivered to a man to be safely kept, and he accepts them, he (*b*)[2] shall be chargeable if they are lost. An officer accepts such things as come to him virtute officii upon this trust, and therefore he (*c*)[2] shall be chargeable for them if they be lost; and one cannot put a case of a public officer to the contrary. The opinion in 4 Co. 83 b. Cro. El. 815, pl. 4, of a general bailment is (*d*) not law; for upon a general bailment the (*e*) bailee ought to keep them only as his own.

5. Before the 12 Car. 2, c. 35, any one might have erected a post-office, and such erector had been liable for miscarriage; and therefore this postmaster is liable also; for now the Act having prohibited the subjects to employ any other but this post-master-general, it would be hard to deprive them of the remedy which they had before.

Objection. The plaintiff has a remedy against Breese.

Answer. If it could be proved that Breese took out the Exchequer bills, he agreed that it was so; likewise any stranger that took them out might be charged as a tort-feasor; but Breese cannot be charged as an officer for neglect: for misfeasance of a deputy an action will lie against him, but that is not qua officer, but qua tort feasor. And according to this is the difference between a negligent and a voluntary escape. A gaoler is liable to an action for the latter, but not for the former. This office is manageable only by them, their deputies and servants, and what is done by a deputy, is done by the principal; and reasonable, **[656]** because the principal may remove the deputy at pleasure, though he puts him in for life, for it is contrary to the nature of a deputy, not to be removeable. Hob. 13. Moor, 856. A deputy may forfeit the office of the principal; as if he does such acts as would be a forfeiture in the principal. 39 H. 6, c. 34.

Objection. Dyer, 238.

Answer. It is (by him) directly contrary to the purpose for which his brother Gould cited it.

Objection. This will be to make the defendants responsible here for the servants of the deputies.

Answer. If a deputy has power to make servants, the principal will be chargeable for their misfeasance, because the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal. But here Breese is the servant of the defendants themselves.

Objection. The defendants are but fellow servants with Breese, because all receive their salaries from the King.

Answer. He is appointed by the defendants, and is their servant, and removeable by them, though they do not pay him his wages. But then suppose that Breese is not a servant of the defendants, then it will be stranger against the defendants, for then Breese will be as a stranger, and then they will be the rather liable, the Act appointing them to manage the office by their servants.

Objection. Powys Justice compared the defendants to a captain of a company; and he shall not be chargeable for the cowardice of his soldiers, no more shall the defendants for the negligence of Breese, admitting him to be a servant.

Answer. If A. received a particular damage by the cowardice of the soldiers of a captain, he shall be chargeable; but in such case, the prejudice is national. But the master of a ship is liable for the neglect of his mariners.

Objection. The Act did not intend that the defendants should be chargeable.

Answer. He was of a contrary opinion, because all the power is placed in the postmaster-general. And when a statute erects a new office, and places it under such circum-**[657]**-stances, as in consequence of law make the officer liable; it must be presumed to have been their intent, that he shall be chargeable.

2. It appears by the words of the Act, that they intended that the dispatches should be safe.

3. It appears by the Act, that it was the judgment of the Parliament, that they were liable for the faults of the deputy. Par. 3. It is provided that the post-masters

general, and their deputies, &c. Then par. 10, a penalty of 5l. is imposed upon the post-master, if there be a failure of furnishing with post-horses; from whence it appears, that the Parliament looked upon the fault of the deputy to be the fault of the post-master.

Objection. This will ruin the office.

Answer. It will make them more careful.

Objection. This will encourage frauds.

Answer. The method to prevent them is to make the post-master liable.

Objection. The plaintiff might have sent his Exchequer bills by some other means.

Answer. That will not excuse the defendants; no more than it will be an excuse to an inn-keeper, that his guest, who has lost his goods, might have gone to another inn.

Objection. The premium limited by the Act is too small.

Answer. The defendants have accepted the office upon those terms.

Objection. The patent is, that they shall observe the orders of the King under the sign manual, and the orders of the Treasury concerning the revenue.

Answer. The observance of the orders of the Treasury will not interrupt their care of the letters; and if a prejudice happen by observance of the King's orders, that will not excuse; because they are obliged to observe the most convenient methods for the execution of the office according to the directions of the Act, and the patent cannot excuse them in any neglect of that.

[658] Objection. There is a clause in the patent, that the post-masters shall not be answerable for a fault in their deputy, but only for their own act.

Answer. That is only intended of imbezzlement of the revenue by their deputies, and as to that the said clause will excuse them; but it will not excuse them from any remedy that the subject hath against them for this benefit by the law. And no non-obstante in such case will avail, nor any charter of exemption. And for these reasons he concluded, that judgment ought to be given for the plaintiff, but the other three Judges being of a contrary opinion, judgment was given for the defendants. But, however, the plaintiff intending to bring a writ of error upon the said judgment, the defendants seeing that, paid (*a*)[6] the money to the plaintiff, as I was informed.

(*a*)[1] D. acc. post, 918. R. acc. 8 Co. 32 b.

(*b*)[1] Semb. acc. ante, 264. Vide Com. Action on the Case for Negligence, b. 1, 22d ed. vol. 11, p. 210, 211.

(*c*)[1] Vide Burr. 1660, 1661, and the Chief Baron's opinion in *Rann* v. *Hughes*, delivered in Dom. Proc. 14th May 1778.

(*a*)[2] Vide Burr. 2300, 2302.

(*a*)[3] Vide 2 Wils. 92. 1 T. R. 73.

(*a*)[4] Vide ante, 499. 4 Co. 4 a.

(*a*)[5] Sed vide 29 El. c. 4, s. 1.

(*b*)[2] Vide post, 918, 919. D. acc. Co. Litt. 89 a.

(*c*)[2] Vide Burr.

(*d*) D. acc. post, 915.

(*e*) D. acc. post, 913, 914, 915, 916. Vide Co. Litt. 89 a. 13th ed. n. 9, 89 b. 13th ed. n. 4.

(*a*)[6] Vide Cowp. 759.

PARKER *vers.* KETT.

[Referred to, *Bridges* v. *Gannett*, 1869, L. R. 4 C. P. 591; 5 C. P. 451.]

S. C. Salk. 95. Holt 221. More at large 12 Mod. 466.

The steward of a manor may authorize a man to take a surrender out of Court. S. C. Com. 84, and so may his deputy. S. C. Com. 84. Vide 1 Leon. 288. A deputy may do whatever his principal might have done. D. acc. post, 1582. Except make a deputy, and cannot be appointed with less power. Sed vide Cro. El. 48, pl. 2. But a deputation to do a particular act will make a man servant