Holt Chief Justice said, this was not like the case of *Jones* vers. *Morley*, for this must relate to the day of the month; that being spoken of the term, which is an intire thing, could not be construed otherwise. And Powell agreed that it differed much.

(*a*) Acc. Co. Lit. 181 b. (*b*) S. P. Com. 132.

[909] COGGS *vers.* BERNARD.

S. C. Com. 133. Salk. 26. 3 Salk. 11. Holt, 13. Entry, Salk. 735, post, vol. 3, p. 163.

[S. C. 1 Sm. L. C. (11th ed.) 173. Applied, *Boorman* v. *Brown*, 1842, 3 Q. B. 526; 11 Cl. & Fin. 1. Explained, *Ross* v. *Hill*, 1846, 2 C. B. 890. Applied, *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 594; *Skelton* v. *London and North-Western Railway Company*, 1867, L. R. 2 C. P. 636; *Readhead* v. *Midland Railway Company*, 1869, L. R. 4 Q. B. 382; *Giblin* v. *M'Mullen*, 1869, L. R. 2 P. C. 336. Recognized, *Searle* v. *Laverick*, 1874, L. R. 9 Q. B. 122; *Liver Alkali Company* v. *Johnson*, 1874, L. R. 9 Ex. 340; *Nugent* v. *Smith*, 1875-76, 1 C. P. D. 24, 423; *Harris* v. *Great-Western Railway Company*, 1876, 1 Q. B. D. 529. Considered, *Bergheim* v. *Great-Eastern Railway Company*, 1878, 3 C. P. D. 223. Dictum applied, *The Moorcock*, 1889, 14 P. D. 70; *Shaw* v. *Great-Western Railway Company* [1894], 1 Q. B. 380. Referred to, *The Winkfield* [1902], P. 59; *Harris* v. *Perry* [1903], 2 K. B. 226; *Cheshire* v. *Bailey* [1905], 1 K. B. 242.]

If a man undertakes to carry goods (*a*)[1] safely and securely, he is responsible for any damage they may sustain in the carriage thro' his neglect tho' he was not a common carrier and was to have nothing for the carriage.

In an action upon the case the plaintiff declared, quod cum Bernard the defendant, the tenth of November 13 Will. 3, at, &c. assumpsisset, salvo et secure elevare, Anglice to take up, several hogsheads of brandy then in a certain cellar in D. et salvo et secure deponere, Anglice to lay them down again, in a certain other cellar in Water-Lane, the said defendant and his servants and agents, tam negligenter et improvide put them down again into the said other cellar, quod per defectum Curae ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alledged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being thought to be a case of great consequence, it was this day argued seriatim by the whole Court.

Gould Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage: and if a praemium be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an (*b*)[1] action will not lie for non-performanee, because it is nudum pactum. So is the 3 H. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129, upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud. ubi supra. Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160. 2 H. 7, 11. 22 Ass. 41. 1 R. 10. Bro. Action sur le Case, 78, *Southcote's case* is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which **[910]** is a thing

no man living that is not a lawyer could think of: and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two Judges only, viz. Gawdy and Clench. But in 1 Ventr. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30l. the defendant shewed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Powys agreed upon the negleet.

Powell. The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shewn? And I hold, an action will lie, as this case is. And in order to make it out I shall first shew, that there are great authorities for me, and none against me; and then secondly, I shall shew the reason and gist of this action: and then thirdly, I shall consider *Southcote's case.*

1. Those authorities in the Register 110 a. b. of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by Rast. Entr. 13 c. where there is a declaration so general. The Year Books are full in this point. 43 Ed. 3, 33 a. there is no particular act shewed. There indeed the weight is laid more upon the neglect, than the contract. But in 48 Ed. 3, 6, and 19 H. 6, 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. 7, 11. 7 H. 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 Jones 179. **[911]** Palm. 548. For the bailee is not bound, upon any undertaking against the act of God. Justice Jones in that case puts the case of the 22 Ass. where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An $(a)^2$ action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was

then, the (*b*)[2] action would have lain upon that special undertaking. But there the action was laid generally.

3. *Southcote's* (*c*)[1] *case* is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially, to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon **[912]** consideration of the authorities there cited, I find no such difference. In 9 Ed. 4, 40 b. there is such an opinion by Danby. The case in 3 H. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. 7, 12, there is such an opinion by the by. And this is all the foundation of *Southcote's case*. But there are cases there cited, which are stronger against it, as 10 H. 7, 26. 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bail'd to him to keep. 8 Ed. 2, Fitzh. Detinue 59, the case of goods bail'd to a man, lock'd up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bail'd safely against all events. But if (*a*)[3] 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 his remedy over, but not against such where he has no remedy over.

Holt Chief Justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And (*b*)[3] there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the **[913]** bailor; and this I call a depositum, and it is that sort of bailment which is mentioned in *Southcote's case*. The second sort is, when goods or chattels that are useful, are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be

proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the (*a*)[4] first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But (*b*)[4] my Lord Coke has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them, that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history **[914]** of the authorities in the books in this matter, and by them shew, that there never was any such resolution given before *Southcote's case*. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitz. Detinue 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that differenee, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40 b. was but a debate at Bar. For Danby was but a counsel then, though he had been Chief Justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion and that but by half the Court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence, to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read *Southcote's case* heretofore, I was not so discerning as my brother Powys tell us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty. A fortiori he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Braeton, lib. 3, c. 2, 99 b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae satuitati hoc debet imputare. As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and **[915]** by reason thereof the goods happen to be stolen with his own; yet he shall

not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem surto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet. So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong doers. 3 Cro. 214, acc. 2 Cro. 425, acc. upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do it more so, when spoken. Doct. & Stud. 130, is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's case;* if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. commodatum or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton ubi supra: his words are, is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam **[916]** accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus suerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, scilicet locatio or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62 b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem (*a*)[5] diligentissimus paterfamilias suis rebus adhibet, quam si praestiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de

qua superius dictum est. From whence it appears, 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; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the (*b*)[5] bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz. vadium or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for (*c*)[2] the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be **[917]** such as it will be the worse for using, the (*a*)[6] pawnee cannot use it, as cloaths, &c. but if it be such, as will be never the worse, as if jewels for the purpose were pawn'd to a lady, she (*b*)[6] might use them. But then she must do it at her peril, for whereas, if she keeps them lock'd up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robb'd of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawn'd, to maintain it, as a horse, cow, &c. then (*c*)[3] the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompense for the meat. As to the second point Bracton 99 b. gives you the answer. Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit ereditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere. In effect, if a creditur takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's case* is. But indeed the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawn'd, be tender'd to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him, is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a publick employment, or a delivery to a private **[918]** person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the ease of the common carrier, common hoyman, master of a ship, &c. which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors* v. *Slew*, Raym. 220. 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors and such like. And though a bailee is to

have a reward for his management, yet he is only to do the best he can. And if he be robb'd, &c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it lock'd up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestick servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Braeton, lib. 3, 100, it is called mandatum. It is an obligation which arises ex mandato. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vin-[919]-nius in his Commentaries upon Justinian, lib. 3, tit. 27, 684, defines mandatum to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton ubi supra says, contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis. I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case, a neglect is a deceipt to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7, 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drown'd by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but nudum pactum. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the (a)[7] defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, shew that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the [920] Court, what if he had built the house unskilfully, and it is agreed

in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards revers'd, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slew* was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

(*a*)[1] Vide Jones, 60. (*b*)[1] Vide post, 919.
(*a*)[2] Vide post, 919, and the books there cited.
(*b*)[2] Vide Com. 627. Burr. 1638.
(*c*)[1] That notion in *Southcote's case*, 4 Rep. 83 b. that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole Court, ex relatione m'ri Bunbury. Note to 3d ed.
(*a*)[3] Vide Jones 44. (*b*)[3] Vide Jones 35.
(*a*)[4] Vide Jones 36.
(*b*)[4] Vide ante, 655. Jones 41.
(*a*)[5] Vide Jones 87.
(*b*)[5] D. acc. post, 1087.
(*c*)[2] S. P. 3 Salk. 268. Holt 528. Salk. 522.
(*a*)[6] S. P. 3 Salk. 268. Holt 528. Salk. 522.
(*b*)[6] S. P. 3 Salk. 268. Holt 528. Salk. 522, vide Jones 80, 81.
(*c*)[3] S. P. 3 Salk. 268. Holt 528. Salk. 522, vide Jones 80, 81.
(*a*)[7] Vide Jones 56, 57, 61.

REGINA *vers.* GODDARD AND CARLTON.

S. C. 3 Salk. 171.

In an indictment matter of inducement may be stated by way of recital. Vide post, 1363. In an indictment for forging an assignment of a lease, the lease is matter of inducement only. Vide post, 1363. Qu. Whether upon such an indictment an allegation that it is witnessed by a certain indenture that the lessor had demised, and by the said indenture did demise, it is a sufficient allegation that there was a lease. Unless such assignment was by deed, the indictment must shew that it was signed. If a party is found guilty of a misdemeanor upon one indictment, and then a second is preferred against him for the same offence under the idea that the former was defective, the Court will not as of course enter judgment for him upon that before they make him plead to the other. 'Tis no plea in abatement to an indictment for a misdemeanor, that there is another indictment depending against the defendant for the same offence.

An indictment for forging an assignment of a lease: the indictment was, juratores super sacramentum suum praesentant, quod cum testatum existit per quandam indenturam, quod J. S. dimisisset et concessisset, et per eandem indenturam dimisit