over as lessee for years (as it was held) may: it was resolved, that the guardian shall oust neither; and therewith [83 a] agrees the resolution of all the justices in 36 H. 8. Leases Br. 58. It was likewise resolved, that if the guardian may oust the lessee for years, yet forasmuch as his term is certain, *sc.* certain in beginning, in continuance, and in end, he cannot by any possibility hold over in such case: but in the case at Bar, and in the other cases of tenant by *elegit*, statute merchant, &c. and there is no term certain, but until such a sum be by them levied, and therefore it stands with such interest, that in some case he may hold over, and so a difference. And it was said, that the words of the Statute of † Marlebridge; *Salva sit nihilominus hujusmodi feoffatis actio sua, quoad terminum, seu ad feodum recuperandum, quam inde habuerint*, that is to be intended of an estate or lease made by collusion, for to *that* the purview of the said Act extends, *sc.* that the guardian shall oust him, and in such case without question the lessee shall not hold over (B).

[83 b] SOUTHCOTE'S CASE.

Pasch. 43 Eliz.

In the King's Bench.

[See *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 595; *Harris* v. *Perry* [1903], 2 K. B. 226.]

It is no plea to a declaration in detinue averring that the plaintiff had delivered certain goods to the defendant to be kept safe, that after the delivery one J. S. stole them out of his possession.

To be kept and to be kept safely is all one.

But if goods are accepted to be kept as the bailee would keep his own proper goods, if the goods are stolen, the bailee shall not answer for them.

So if goods are pawned for money, unless the pawnor tendered the money before the stealing and the pawnee refused it.

So if the goods are delivered in a chest locked, and the bailor takes away the key, the bailee shall not be charged if the goods are stolen.

A ferryman, common innkeeper, or carrier, shall not be discharged if the goods are stolen; otherwise of a factor.

If traitors break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom. S. C. Cro. Eliz. 815.

Southcote brought *detinue* against Bennet for certain goods, and declared, that he delivered them to the defendant to keep safe; the defendant confessed the delivery, and pleaded in bar that after the delivery one J. S. stole them feloniously out of his possession: the plaintiff replied, that the said J. S. was the defendant's servant retained in his service, and demanded judgment, &c. And thereupon the defendant demurred in law, and judgment was given for the plaintiff: and the reason and

† Marl. cap. 6. 2 Inst. 109.

(B) A limitation made in a settlement before the marriage of A., was to the use of trustees and their heirs until they should raise certain sums of money, if not paid at a fixed time by A. the portions were not then paid, and the trustees permitted the assignees of A. to enter and take profits of the land beyond the amount of the sums of money: held, that the trustees may afterwards enter, and hold over to raise the sums. *Thomason* v. *Mackworth*, Bridgm. Rep. by Barn. 502. There is a difference between a limitation of a chattel estate for a term certain, and a limitation till such a sum be levied, or the like; where it is certain in the commencement, continuance, and end, though the lessor or his heir, or he that hath the next estate, enter wrongfully upon him to whom the estate is limited, he shall not hold over, but is put to his remedy for the mesne profits. *Thomason* v. *Mackworth*, *ubi sup.* See also there the observations on *Rosse's case*, Moor 556. which last case seems *contra* to *Corbet's case*.

cause of their judgment was, because the plaintiff delivered the goods to be safe kept, and the defendant had took it upon him by the acceptance upon such delivery, and therefore he ought to keep them at his peril, although in such case he should have nothing for his safe keeping. So if A. delivers goods to B. generally to be (*a*) kept by him, and B. accepts them without having any thing for it, if the goods are stole from him, yet he shall be charged in *detinue*: for to be kept, and to be kept safe, is all one (A). But if A. accepts goods of B. to keep them as he would keep (*b*) his own proper goods, there, if the goods are stolen, he shall not answer for them: or if goods are pawned or pledged to him for money (B), and the goods are stolen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a property in them and not a custody only, and therefore he shall not be charged as it is adjudged in 29 Ass. 28. But if (*d*) before the stealing he who pawned them tendered the money, and the other refused, then there is fault in him; and then the stealing after such tender, as it is there held, shall not discharge him (C): so if A. delivers to B. a (*e*) chest locked to keep (D), and he himself carries away the key, in that case if the goods are stolen, B. shall not be charged, **[84 a]** for A. did not trust B. with them, nor did B. undertake to keep them, as it is adjudged in 8 E. 2. Detinue (*a*) 59. So the doubt which was

(*a*) 1 Leon. 224. Owen 141. 1 Roll. 338. Cro. El. 219. 815. 10 H. 6. 21 a. Co. Litt. 89 a. Doct. & Stud. 129 a. b. Moor 543. Palm. 549, 550.

(A) That a general bailment and a bailment to be safely kept is all one was denied to be law by the whole Court, *ex relat' m'ri*, Bunb. note 3d ed. 2 Lord Raym. *Coggs* v. *Bernard*, 911. *Vid.* Jones on Bailment 41. 83 b. in *Kettle* v. *Bromsall* Willes' Rep. 121. Willes, C.J. in delivering the judgment of the Court observed, that according to *Southcott's case*, the case of *Coggs and Barnard* and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, detinue will lie against him; for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the defendant to take care of them as his own proper goods, &c. if he be robbed of them, that is a good plea.

(*b*) Co. Lit. 89 a.

(B) The law requires nothing extraordinary of the pawnee but only that he shall use an ordinary care for restoring the goods. *Vid.* the judgment of Holt, C.J. *Coggs* v. *Bernard*, 2 Lord Raym. 917. Jones on Bailment 82. In Jones on Bailment, p. 75. the learned author questions the position of Lord Coke, that the pawnee shall be discharged if the goods are stolen, on the ground that a bailee cannot be considered as using ordinary diligence who suffers the goods bailed to be taken by stealth out of his custody; and gives it as his opinion 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. *Vid. Finucane* v. *Small*, 1 Esp. N. P. C. 315. A depository for hire (who is answerable for the same degree of negligence as a pawnee) who had lodged the goods in a place of security, where things of much greater value were kept, was held not to be answerable for the goods which had been stolen by his own servants. Lord Kenyon observed that positive negligence must be proved.

(*c*) 1 Roll. 338. Co. Lit. 89 a. Palm. 550.

(*d*) 1 Roll. 338. Co. Lit. 89 a. L. Raym. 917.

(C) 2 L. Raym. 917. *Coggs* v. *Bernard*, S. C. 3 Salk. 268. S. C. Holt. 528. *Anon.* Salk. 522. Jones on Bailm. 70.

(*e*) Co. Lit. 89 a. b.

(D) In *Coggs* v. *Bernard*, 2 L. Raym. 914, Holt, C.J. observes, I cannot see the reason of that difference, 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 where they are in a chest; and he has as great power to defend them in one case as in the other, Sir Wm. Jones, Bailm. 38. observes that the difference may be very material as to the defence; for no man can proportion his care to the nature of things without knowing them. *Vid. Batson* v. *Donovan*, 4 B. & A. 21. *Sleat* v. *Fagg*, 5 B. and A. 348.

(*a*) Co. Lit. 89 a. b. Vet. Nat. Br. 59 b.

conceived upon sundry differing opinions in our books, in 29 Ass. 28. 3 H. 7. 4. 6 H. 7. 12. 10 H. 7. 26. of Keble and Fineux, are well reconciled, *vide* Bract. lib. 2. fol. 62 b. But in accompt it is a good plea before the auditors for the (*b*) factor (E), that he was robbed, as appears by the books in 12 (22) E. 3. Accompt 111. 41 E. 3. 3 and 9 E. 4. 40. For if a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandize the best that he can, and a servant is bound to perform the command of his master: but a ferryman, (*c*) common innkeeper (F), or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves, *vide* 22 Ass. 41. Br. Action sur le Case 78. And the Court held the (*d*) replication idle and vain, for *non refert* by whom the defendant was robbed, *vide* 33 H. 6. (1.) 31 a. b. If (*e*) traitors (G) break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom; for in the one case he may have his remedy and recompence, and in the other not. *Nota* reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon him to do it.

[84 b] LUTTREL'S CASE.

Pasch. 43 Eliz. Rot. 569.

In the King's Bench.

[See *Hill* v. *Cock*, 1872, 26 L. T. 186; *Aynsley* v. *Glover*, 1874, L. R. 18 Eq. 549; L. R. 10 Ch. 283; *Warren* v. *Brown* [1900], 2 Q. B. 727; [1902], 1 K. B. 15.]

Action on the case for diverting a water-course.

Somers. ss. Be it remembered, that heretofore, that is to say, in the term of St. Michael last past, before our lady the Queen at Westminster, came Edw. Cottel, gent. by J. Nightingale his attorney, and brought here into the Court of the said lady the Queen, then there, his certain bill against George Luttrel, Esq. Robert Norcome, and John Quick, in the custody of the marshal, &c. of a plea of trespass upon the case: and there are pledges of prosecuting, to wit, John Doe and Richard Roe, which said bill follows in these words: ss. Somerset. ss. Edw. Cottel, gent. complaineth of George Luttrel, Esq., Robert Norcome, and John Quick, being in the custody of the marshal of the Marshalsea of the said lady the Queen, before the Queen herself, for that, viz. that whereas the said Edward, on the 4th day of May

(*b*) Co. Lit. 89 a. 1 Roll. 124. Moor 462. Doct. pla. 13. 1 Brownl. 25. Doct. and Stud. 129 b.

(E) *Vid. Vere* v. *Smith* [2 Lev. 5. 1 Vent. 121. 2 Keble 761. 779. 830]. *Woodliffe's case*, Moor 462, acc.; and *vid.* Jones on Bailment 98.

(*c*) 1 Sid. 36. Aleyn 93. Palm. 523. 2 Sand. 380. 1 Roll. 2. 124. 2 Roll. 567. 1 Roll. Rep. 79. 2 Bulstr. 280. Cro. Jac. 262. 330, 331. Hob. 17, 18. Co. Lit. 89 a. Moor 462. 9 E. 4. 19. 1 Vent. 190, 191. 238, 239. 3 Keb. 72, 73, 74. 112, 113, 114. 135. 1 Mod. Rep. 85. 2 Mod. Rep. 270. Plowd. 9 b.

(F) *Vid.* note (A) to *Caley's case*, 8 Co. 32.

(*d*) 2 Bulstr. 249.

(*e*) 1 Roll. 808. Dyer 66. pl. 15. 241. pl. 47. Cro. El. 815. Palm. 550. Jenk. Cent. 231. Bro. Det. 22. Fitz. Barr. 57.

(G) *Vid. Alsept* v. *Eyles*, 2 H. Black. 111. *Elliot* v. *The Duke of Norfolk*, 4 T. R. 789.